No. 93-1128-CFX
Status: DECIDED

Docketed:
January 11, 1994

Title: Jesse Brown, Secretary of Veterans Affairs, Petitioner
v.
Fred P. Gardner

Court: United States Court of Appeals for the Federal Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Hannon Jr.,Joseph Michael

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Entry	Date	Note	Proceedings and Orders
1	Dec 3 1993	G	Application (A93-460) to extend the time to file a petition for a writ of certiorari from December 12, 1993 to January 11, 1994, submitted to The Chief Justice.
2	Dec 6 1993		Application (A93-460) granted by the Chief Justice extending the time to file until January 11, 1994.
3	Jan 11 1994	G	Petition for writ of certiorari filed.
5	Jan 24 1994		Order extending time to file response to petition until March 10, 1994.
6	Mar 10 1994		Brief of respondent Fred P. Gardner in opposition filed.
7	Mar 10 1994	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	Mar 16 1994		DISTRIBUTED. April 1, 1994 (Page 1)
9	Mar 28 1994	X	Reply brief of petitioner Jesse Brown, Secretary of Veterans Affairs filed.
10	Apr 4 1994		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	Apr 4 1994		Petition GRANTED.
			**********
12	May 19 1994		Joint appendix filed.
15	May 19 1994		Brief of petitioner Jesse Brown, Secretary of Veterans Affairs filed.
14	May 20 1994		Order extending time to file brief of respondent on the merits until July 8, 1994.
16	May 24 1994		LODGING consisting of one ring binder containing nine opinions of the VA General Counsel.
19	Jul 7 1994		Brief amicus curiae of State of Texas filed.
17	Jul 8 1994		Brief of respondent Fred P. Gardner filed.
18	Jul 8 1994		Brief amici curiae of Paralyzed Veterans of America, et al. filed.
20	Jul 8 1994		Brief amicus curiae of National Veterans Legal Services Project filed.
21	Aug 9 1994		CIRCULATED.
22	Aug 10 1994		Record filed.
		*	Certified record proceedings United States Court of Veterans Appeals.
23	Aug 11 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Federal Circuit.
24	Aug 12 1994	X	Reply brief of petitioner filed.

No. 93-1128-CFX

Entry	Date	Note	Proceedings and Orders
26	Aug 17 1994		SET FOR ARGUMENT MONDAY, OCTOBER 31, 1994. (1ST CASE).
25	Aug 18 1994		LODGING by petitioner. Notebook binder containing opinions of the VA General Counsel.
27	Oct 31 1994		ARGUED.
28	Dec 12 1994		Adjudged to be AFFIRMED. Souter, J., delivered the opinion for a unanimous Court.

Supreme Court, U.S.
FILED

93 1128 JAN 11 1994

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
PETITIONER

v.

FRED P. GARDNER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

A federal statute initially enacted in 1924 provides that veterans injured as the result of treatment at hospitals operated by the Department of Veterans Affairs may, in some circumstances, be entitled to disability compensation. For at least 60 years VA regulations have uniformly construed this statute to provide for compensation only where there is a showing of fault or "accident" on the part of the VA. The question in this case is whether the Court of Appeals for the Federal Circuit erred in refusing to defer to this longstanding administrative construction and in holding, instead, that the statute creates liability without fault.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
PETITIONER

v.

FRED P. GARDNER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the Secretary of Veterans Affairs, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 5 F.3d 1456. The opinion of the Court of Veterans Appeals (App., *infra*, 22a-30a) is reported at 1 Vet. App. 584. The opinion of the Board of Veterans' Appeals (App., *infra*, 32a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1993. On December 6, 1993, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 38 U.S.C. 1151 (Supp. IV 1992) provides as follows:

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Secretary [of Veterans Affairs], or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or, on or after December 1, 1962, enters into a settlement or compromise under section 2672 or 2677 of title 28 by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

2. The current regulation implementing Section 1151, 38 C.F.R. 3.358(c), provides in part as follows:

> (c) *Cause.*
>
> * * * * *
>
> (3) Compensation is not payable for either the contemplated or foreseeable after[-]results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

3. Section 31 of the Act of Mar. 28, 1934, ch. 102, Tit. III, 48 Stat. 526, formerly codified at 38 U.S.C. 501a (1952), provided as follows (before its repeal by the Veterans' Benefits Act of 1957, Pub. L. No. 85-56, § 2202(132), 71 Stat. 168):

> Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury,

as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits to World War veterans, or as the result of having submitted to examination under authority of the War Risk Insurance Act or the World War Veterans' Act, 1924, as amended, and not the result of his misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, the benefits of Public Law Numbered 2, of the Public Law Numbered 78, and of this title shall be awarded in the same manner as if such disability, aggravation, or death were service connected within the meaning of such laws; except that no benefits under this section shall be awarded unless application be made therefor within two years after such injury or aggravation was suffered, or such death occurred, or after the passage of this Act, whichever is the later date. The benefits of this section shall be in lieu of the benefits under the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916, as amended.

4. Section 213 of the World War Veterans' Act, 1924, ch. 320, 43 Stat. 623, provided as follows (before its repeal by the Act of Mar. 20, 1933, ch. 3, Tit. I, § 17, 48 Stat. 11):

> That where any beneficiary of this bureau suffers or has suffered an injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him by the director and not the result of his misconduct, and such injury

> or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title shall be awarded in the same manner as though such disability, aggravation, or death was the result of military service during the World War. The benefits of this section shall be in lieu of the benefits under the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,' approved September 7, 1916; and from any payments due hereunder shall be deducted all amounts paid by any person other than [the] United States as damages or compensation for such injury, aggravation, or death: *Provided*, That application be made for such benefits within one year after such injury or aggravation was suffered or such death occurred or after the passage of this Act or whichever is the latest date.

STATEMENT

Respondent served on active duty with the United States armed forces from April, 1953, to January, 1955. App., *infra*, 33a. In 1986 respondent was admitted to a hospital operated by the Department of Veterans Affairs (VA)[1] for evaluation and treatment of pain in his legs. *Ibid.* The condition for which respondent sought treatment was not connected in any way to his military service.[2] See *id.* at

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[1] Like the court of appeals (App., *infra*, 2a n.1), we refer to both the Department and its predecessors, the Veterans' Administration and Veterans' Bureau, as the VA.

[2] Veterans with non-service-connected conditions may be eligible for VA medical care, subject to availability of facilities, based on such criteria as age, ability to pay for care,

2a. VA physicians correctly diagnosed a herniated disc, and after other treatments failed they performed surgery to remove the disc. *Ibid.*

Although respondent's surgery was apparently successful in removing the herniated disc, respondent subsequently experienced further problems with his left leg and ankle. App., *infra*, 34a-35a. Asserting that those problems resulted from the surgery, respondent filed a claim for disability benefits under 38 U.S.C. 1151 (Supp. IV 1992). That statute provides that an incremental disability resulting from "an injury, or an aggravation of an injury, [suffered] as the result of * * * medical or surgical treatment * * * awarded under any of the laws administered by the Secretary" will be treated as though it were "service-connected," thus making the veteran eligible for a variety of medical, disability and other benefits.[3]

The VA's regional office denied respondent's claim for disability benefits (see App., *infra*, 2a), and

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and whether the veteran has a separate, service-connected condition. Respondent was entitled to VA care for his non-service-connected back condition under what was then 38 U.S.C. 610(a)(1)(B) (1982), now recodified at 38 U.S.C. 1710(a)(1)(I) (Supp. IV 1992).

[3] Although not so limited by its terms, as a practical matter Section 1151 is important today only for claims, like respondent's, based on incremental disabilities resulting from care provided for non-service-connected conditions. Any incremental disability resulting from care provided for a service-connected condition is independently compensable, without any showing of fault, under other statutory and regulatory provisions. See 38 U.S.C. 1110, 1121, 1131 (Supp. IV 1992); 38 C.F.R. 3.310(a).

the Department's Board of Veterans' Appeals affirmed. *Id.* at 32a-40a. After reviewing the medical evidence (*id.* at 33a-35a), the Board pointed out (*id.* at 36a) that under Section 3.358(c)(3) of the Department's regulations, a disability will be treated as compensable under Section 1151 only if it "proximately resulted [from] carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of the VA, or from the occurrence of an "accident," defined in the regulation as "an unforeseen, untoward event."[4] 38 C.F.R. 3.358(c)(3). Reviewing the evidence in light of that standard, the Board found (App., *infra*, 37a) no "indication that treatment afforded [respondent] was in any way negligent, or at variance with sound medical practice, or was otherwise at fault." Similarly, the Board found no "untoward result in the sense contemplated by the law and regulation." *Id.* at 37a. The Board therefore denied respondent's claim.

The Court of Veterans Appeals reversed. App., *infra*, 22a-30a. It held that the statute itself neither imposed nor authorized the fault-or-accident requirement invoked by the Board under Section 3.358(c)(3) of the regulations. The court reasoned (App., *infra*, 25a-27a) that the statute's plain language imposed no fault requirement, and that a no-fault construction was plausible and would not lead to absurd results. The court rejected (*id.* at

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[4] The VA previously interpreted the "unforeseeability" aspect of this definition quite strictly. See Op. VA Gen. Coun. 2-78 (1978). In December, 1990, the VA adopted a broader construction, treating as "accidental" those consequences of medical or surgical care that are "not reasonably foreseeable." See Op. VA Gen. Coun. 99-90, at 10 (1990).

28a-30a) the Secretary's arguments that the legislative history demonstrated an intent to provide compensation only in cases of fault or accident, that repeated congressional reenactment or amendment of the statutory language had ratified its longstanding regulatory interpretation by the Secretary, and that the Secretary's construction was entitled to deference. The court therefore invalidated Section 3.358(c)(3) as inconsistent with the statute. App., *infra*, 30a. Because the Board had relied on Section 3.358(c)(3) in reaching its decision, the court remanded the case for a redetermination of respondent's claim without reference to that provision.

The Court of Appeals for the Federal Circuit affirmed. App., *infra*, 1a-21a. Like the Court of Veterans Appeals, the Federal Circuit reasoned that the plain language of the statute lacked a fault or accident element; it rejected the Secretary's contention that the statutory language referring to injuries suffered "as the result of" VA care was at least ambiguous on this point. *Id.* at 4a-9a. Although it undertook (*id.* at 9a-18a) an extensive review of the history of the statute's original enactment, reenactment, and regulatory interpretation, the court concluded (*id.* at 18a) that the Secretary had failed to make the "extraordinarily strong showing of clear legislative intent" (*id.* at 9a) necessary to convince the court to depart from what it viewed as the clear language of the statute. The court declined to defer to the Secretary's interpretation of the statute, on the grounds that the statutory language was clear; that the regulatory interpretation was not contemporaneous with the original enactment of the statute; and that the regulation's long history was not highly probative in light of the fact that the Department's

regulations did not become subject to judicial review until the creation of the Court of Veterans Appeals in 1988. *Id.* at 18a-20a. Finally, the court rejected (*id.* at 20a-21a) the Secretary's argument that Congress had ratified the VA's interpretation of the statute by reenacting the statute, and amending it in related ways, after the regulation in question was well-established.

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Federal Circuit has adopted a no-fault construction of a federal benefits statute that is contrary to the fault-based interpretation given to that statute for more than sixty years by the agency charged with its administration. The Department of Veterans Affairs estimates that, unless it is reversed, the court of appeals' construction will require additional federal expenditures of approximately $1 billion over the next five years. Moreover, the applicable jurisdictional provisions are such that, in the absence of legislative action, the court of appeals' decision in this case will permanently resolve this important federal statutory issue. In these circumstances, the case warrants review by this Court.

1. Section 1151 provides that "[w]here any veteran shall have suffered an injury * * * as the result of * * * medical or surgical treatment * * * awarded under any of the laws administered by the Secretary, * * * and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran," the VA will pay compensation for the incremental disability or death in the same manner as if

it were service-connected. 38 U.S.C. 1151 (Supp. IV 1992). The court of appeals' decision in this case rests primarily on what the court deemed to be the plain language of the statute: in the court's view, the statute "unambiguously does not require the veteran to prove that the VA treatment was faulty or that an accident occurred during the treatment." App., *infra*, 9a. That conclusion, however, ignores ambiguity inherent in the statutory language, and disregards the history and context of the provision. When one applies such "traditional tools of statutory construction," it becomes apparent that, contrary to the court of appeals' decision, "the precise question at issue" in this case cannot be finally resolved simply by reference to the statutory text. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 & n.9 (1984).

Section 1151 applies to veterans who have suffered an "injury" occurring "as the result of" one of the activities specified in the statute, including medical or surgical treatment. 38 U.S.C. 1151 (Supp. IV 1992). While the most general definition of the term "injury" is any "hurt, damage, or loss sustained," the word is also used to refer more specifically to "an unjust or undeserved infliction of suffering or harm," or, in its legal sense, to a "violation of another's rights for which the law allows an action." *Webster's Third New International Dictionary* 1164 (1986).[5] Thus, the word as used in the statute could

[5] See also I *The New Shorter Oxford English Dictionary* 1371 (1993), which gives as the primary definition "wrongful action or treatment; violation or infringement of another's rights; suffering wilfully inflicted; a wrongful act; a wrong inflicted or suffered."

well include some connotation of fault or of an unforeseen and untoward occurrence. Conversely, even the court of appeals' construction of Section 1151 would apparently not require compensation for incremental disabilities necessarily resulting from appropriate medical treatment—amputation of a leg, for example, in order to prevent death from the spread of gangrene—even though such results would presumably represent "hurt, damage, or loss sustained," and therefore qualify as "injuries" within the broadest possible definition. Thus, no single dictionary definition can by itself supply an unambiguously correct meaning for the word in its statutory context.

Moreover, a compensable "injury" must occur "as the result of" a specified activity. 38 U.S.C. 1151 (Supp. IV 1992). The court of appeals correctly observed that under that language "the specified treatment must *cause* the injury" for which the veteran claims compensation. App., *infra*, 8a. But the court passed too quickly from that statement to its conclusion that the statutory causation requirement could include no element of fault or unforeseeability. In many kinds of medical treatment, for example, some statistically predictable percentage of adverse complications will result from appropriate treatment, properly performed. It is by no means self-evident from the statutory text alone that all such outcomes should be considered to have "resulted from" the treatment received, rather than from the patient's own physiology or from simple misfortune. While it is true, as the court remarked (*ibid.*), that "[c]ausation and fault are fundamental, distinct concepts in the law," it is equally true that the law routinely recognizes the need for both factual and *legal* causation.

The VA's conclusion that faultless or foreseeable adverse medical outcomes like respondent's are insufficiently related to any "injury" occurring "as a result of" VA medical care to be within the intended scope of Section 1151 involves a routine sort of statutory interpretation that is not precluded by the "plain" language of Section 1151. See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992) ("Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context."); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292-293 (1988) (opinion of Kennedy, J.).

2. Even in isolation, therefore, the statutory language is not so clear and unambiguous as to justify the court of appeals' rejection of the Secretary's longstanding limiting construction. See App., *infra*, 18a-19a. That conclusion is reenforced when the statute is viewed in the context of its legislative and regulatory history. See, *e.g.*, *Chevron*, 467 U.S. at 843 n.9 (directing use of "traditional tools of statutory construction" in determining whether intent of statute is clear); *American Hosp. Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1544 (1991) (finding no ambiguity after reviewing both text and legislative history). That history, discussed below, raises at the very least a significant question as to whether Congress intended to enact a no-fault compensation scheme for all adverse medical outcomes, rather than a more traditional fault-based system. Under those circumstances, the court of appeals erred in refusing to defer to the Secretary's construction of the statute.

Section 1151's first precursor was enacted in 1924 as Section 213 of the World War Veterans' Act, ch.

320, 43 Stat. 623 (reprinted at pages 4-5, *supra*). As demonstrated by the extensive excerpts from the legislative history of that Act quoted by the court of appeals (App., *infra*, 10a-13a), it is difficult to ascertain from that history alone whether either the VA or Congress at that time contemplated providing compensation only for injuries occurring "as the result of accident or negligence of treatment or unskillfulness —things that must sometimes happen," or also for those occurring where "the debtor does the best he can * * * without neglect * * * [and] [w]ith the best medical advice." *Id.* at 10a, 11a (emphasis omitted) (quoting testimony of VA Director).

In 1926, however—within two years after the initial enactment of the statute—General Frank Hines, the VA Director who suggested enactment of Section 213 and who testified before Congress in its favor, issued VA Regulation No. 137 (C.A. App. 102). That regulation provided that compensation would not be paid "for the ordinary residuals of disease or injury following accepted medical treatment," but would be paid if "additional disease or injury is the result of examination or treatment, *improperly given*." *Ibid.* (emphasis added). Shortly thereafter, General Hines promulgated Regulation No. 157, amending the quoted language to make clear that compensation would be paid "where there is satisfactory evidence of *malpractice, malfeasance, or misfeasance* on the part of the [VA]" (emphasis added). That regulation in turn was superseded in 1927 by Regulation No. 167 (C.A. App. 104), which replaced the "malpractice" language with the formulation that the "usual after results of approved medical care" would not entitle a patient to compensation. Thus, the court of appeals erred in discounting the

VA's construction of the statute on the ground that it was not contemporaneous with the enactment of the original provision. App., *infra*, 19a.

Contrary to the court of appeals' understanding (App., *infra*, 13a), it also appears that, in applying Regulation No. 167, the VA did in fact require claimants to show fault or accident in order to recover (although a showing of fault might not rise to the level of malpractice). Claim of Frank McKeown, 50 Op. VA Gen. Coun. 439 (1928); Claim of William Concannon, 65 Op. VA Gen. Coun. 429, 431 (1930) ("the benefits provided by Section 213 * * * may be awarded in this case, if the disability causing the death proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, etc., in furnishing the treatment, as distinguished from the usual after results of approved medical care and treatment properly administered"); see also 9 Comp. Gen. 515, 516 (1930) ("plain intent" of Section 213 was to grant compensation in cases involving accident or fault). That administrative interpretation was therefore well established by the time that Congress repealed Section 213, along with numerous other benefits provisions, as part of the Act of Mar. 20, 1933 (the Economy Act), ch. 3, Tit. I, § 17, 48 Stat. 11. It remained the established construction in 1934, when Congress enacted a successor provision in substantially the same terms as Section 213. Act of Mar. 28, 1934, ch. 102, Tit. III, § 31, 48 Stat. 526 (formerly codified at 38 U.S.C. 501a (1952)).

Congress is presumed to be aware of the established administrative and judicial interpretations of statutes that it reenacts, amends or adapts for other purposes, and to adopt such interpretations when

it makes no relevant change to the statutory language. *E.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). In this case, moreover, the legislative history of the 1934 reenactment focused directly on the issue of fault. As the court of appeals noted (App., *infra*, 15a), the Senator who introduced the amendment restoring the benefits formerly provided under Section 213 described his proposal as covering cases where "a veteran is disabled by reason of *mistreatment* on the part of a Government agent, *as in a case of malpractice by a Government surgeon.*" 78 Cong. Rec. 3289 (1934) (emphasis added) (statement of Senator Steiwer). In a portion of his statement not quoted by the court, he added that "[t]here are only a limited number affected by this amendment—I think it is 65—who have suffered at the hands of [VA] physicians. They were swept off all the rolls by the Economy Act. We seek by this amendment to put that little group back where they can be dealt with generously by their Government." *Id.* at 3290; see also *Independent Offices Appropriations Bill for 1935: Hearings Before the Subcomm. of the Senate Comm. on Appropriations*, 73d Cong., 2d Sess. 117 (1934). That very small estimate of the scope of statutory coverage indicates that the legislation's sponsor did not contemplate enactment (or reenactment) of any broad no-fault entitlement.[6]

The 1934 Congress that enacted what became 38 U.S.C. 501a (1934) thus did so against the back-

[6] In the year ending June 30, 1933, the VA reported admission of 66,332 World War I veterans to the VA's own hospitals alone for treatment of non-service-connected disabilities. Administrator of Veterans' Affairs Ann. Rep. 41 (1933).

drop of a well-established fault-or-accident requirement, and under the impression that it was accepting governmental responsibility for a small group of patients injured through mistreatment or malpractice at the hands of government agents.[7] The fault-or-accident requirement was explicitly reconfirmed, as the court of appeals acknowledged (App., *infra*, 16a), shortly after passage of Section 501a in 1934,

[7] The 1934 Congress also acted in an obvious and important historical context. The court of appeals emphasized (App., *infra*, 17a-18a) the remedial goals of Section 1151. Given the economic crisis that precipitated Section 213's repeal in the Economy Act, however, and the representation made to Congress that Senator Steiwer's amendment would restore benefits to only a "little group" of wronged veterans, it is highly unlikely that Congress intended in 1934 to enact (or reenact) a broad scheme of no-fault insurance against adverse medical outcomes for all veterans, whether treated for service-connected or non-service-connected disabilities. Moreover, such a scheme would have been obviously inconsistent with prevailing common law principles of recovery for adverse medical outcomes, so that its enactment should not be presumed in the absence of clearer evidence of congressional intent . See, *e.g.*, *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1879); N. Singer, *Sutherland Statutory Construction* §§ 50.01-50.05, 61.01-61.06 (5th ed. 1992). The court of appeals thought it persuasive (App., *infra*, 17a) that the statute and legislative history provided no affirmative evidence that Congress intended to require claimants under what became Section 1151 to bear the "complex and difficult burden" of proving fault or accident. The court should instead have sought affirmative evidence that Congress intended to carve out an exception from the common law norm and relieve claimants from any burden of proof of fault, even one that is in fact less onerous (because of the possibility of recovery for medical "accidents") than that routinely borne by common law malpractice plaintiffs.

see VA Administrator's Decision No. 255, 1 Admin. Dec. V.A. 321, 323 (1934), and has been consistently maintained from that time through its current embodiment in 38 C.F.R. 3.358(c)(3).[8]

Congress has taken action with regard to the statute several times since 1934. In 1940, Congress enacted a separate provision, in substantially similar terms, that extended the coverage of Section 501a to all veterans submitting to examinations in connection with benefits claims.[9] 38 U.S.C. 501a-1 (1940). In 1957 and 1958, many veterans' benefits provisions, including Sections 501a and 501a-1, were repealed, revised, compiled, and reenacted in a comprehensive new codification.[10] See 38 U.S.C. 351 (1958). In 1962, Congress amended Section 351 to remove a two-year period of limitations on claims and to provide a specific offset for amounts recovered under the Federal Tort Claims Act on account of otherwise compensable injuries, and also enacted a provision setting effective dates for certain Section 351 awards.[11] Congress made further technical

[8] The predecessor to the current regulation was promulgated by the VA in 1936 and was published in the first edition of the Code of Federal Regulations in 1939. See 38 C.F.R. 2.1123(c) (1939). The regulation was promulgated in substantially its current form in 1961. 26 Fed. Reg. 1590-1591 (1961).

[9] Act of Oct. 17, 1940, ch. 893, § 12, 54 Stat. 1197. See S. Rep. No. 2198, 76th Cong., 3d Sess. 12 (1940).

[10] Veterans' Benefits Act of 1957, Pub. L. No. 85-56, §§ 351 (reenactment), 2202(132) (repeal), 71 Stat. 102, 168; Act of Sept. 2, 1958, Pub. L. No. 85-857, § 351, 72 Stat. 1124.

[11] Act of Oct. 15, 1962, Pub. L. No. 87-825, §§ 1 (enacting 38 U.S.C. 3010(c)), 3, 76 Stat. 948, 950. See H.R. Rep. No.

amendments to the statute in 1969, 1976, 1984, and 1991, the last of which also renumbered Section 351 as Section 1151.[12]

Despite this repeated congressional attention to the provision at issue in this case, there is no evidence of legislative dissatisfaction with the fault-or-accident requirement explicitly set out in the VA's regulations. The Secretary's long and consistent interpretation of the statute, the substantial evidence of congressional ratification by reenactment and long acquiescence, and the specific history and context of the 1934 legislation all argue persuasively that the Secretary's regulations are consistent with Congress's intent in passing and retaining Section 1151 and its predecessors. The court of appeals therefore erred in failing (App., *infra*, 18a-20a) to grant appropriate deference to the Secretary's construction of the statute.

3. As noted above (note 3, *supra*), the court of appeals' invalidation of Section 3.358(c)(3) will in practice affect only claims by veterans treated in VA facilities for non-service-connected conditions. The VA estimates, however, that it hospitalizes approximately 830,000 such patients each year; VA physicians provide another 22 million outpatient visits to all veterans each year. Although evaluation of the

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2123, 87th Cong., 2d Sess. (1962); S. Rep. No. 2042, 87th Cong., 2d Sess. (1962).

[12] Act of June 11, 1969, Pub. L. No. 91-24, § 3, 83 Stat. 33; Veterans Disability Compensation and Survivor Benefits Act of 1976, Pub. L. No. 94-433, § 404(19), 90 Stat. 1379; Veterans' Compensation and Program Improvements Amendments of 1984, Pub. L. No. 98-223, § 213(1), 98 Stat. 46; Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, §§ 4(a)(1), 5(a), 105 Stat. 403, 406 (1991).

likely financial impact of the decision in this case is difficult and necessarily imprecise, based on that volume of patient care and on an estimate of the number of non-negligent adverse outcomes occurring in government hospitals for a patient population of similar age, the VA estimates that the court of appeals' decision could result in increased government expenditures of approximately $1 billion over the next five years.[13]

In addition to its significant financial impact, the court of appeals' decision also raises important issues of the appropriate deference owed to the VA's interpretation of the statutes it administers. Parts of the opinion below could be read to call into question the deference that the Federal Circuit believes it owes to any VA regulation originally promulgated before the creation in 1988 of the Court of Veterans Appeals and the provision for review of that court's decisions in the Federal Circuit. App., *infra*, 19a-20a. This Court should exercise its supervisory authority to make clear that the VA's regulations are entitled to the same deference accorded to the regulations of other agencies. Finally, because the Federal Circuit has exclusive jurisdiction over challenges to the validity of the VA's regulations, 38 U.S.C. 7292(c) (Supp. IV 1992), the Secretary will have no opportunity to litigate the issue in this case in

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[13] This estimate is based on the VA's own statistics concerning in-patient and out-patient care provided, claims made by patients, and average compensation cost data, and on adverse outcome and successful claim statistics reported in Harvard Medical Practice Study, *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (1990).

other courts of appeals. Indeed, because the Board of Veterans' Appeals is bound by the decision below and because the government has no right to appeal from adverse decisions rendered by the Board, 38 U.S.C. 7252(a) (Supp. IV 1992), the Secretary will have no opportunity to seek review of this issue before any court at all in any future case. These factors make review by this Court especially appropriate in the present case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1994

APPENDIX A

UNITED STATES COURT OF APPEALS FEDERAL CIRCUIT

No. 92-7025

FRED P. GARDNER, CLAIMANT-APPELLEE

v.

JESSE BROWN, Secretary of Veterans Affairs, RESPONDENT-APPELLANT

Sept. 13, 1993

Before ARCHER, MICHEL, and LOURIE, Circuit Judges.

ARCHER, Circuit Judge.

The Secretary of Veterans Affairs appeals from a judgment of the United States Court of Veterans Appeals (Veterans Court), No. 90-120 (entered Jan. 13, 1992). The Veterans Court reversed the decision of the Board of Veterans' Appeals holding that Gardner is not entitled to disability compensation, and remanded the case for further proceedings. 1 Vet. App. 584. We affirm.

I.

Fred P. Gardner, a veteran of the Korean conflict, underwent back surgery at a Department of Veterans Affairs (VA)[1] medical facility for a non-service-connected back condition. He asserts that as the result of the surgery he developed severe nerve damage in his left leg, resulting in pain, atrophy, and weakness, and that since the surgery his left ankle is severely impaired requiring him to wear a leg brace. Accordingly, Gardner filed a claim for disability compensation with the VA Regional Office in Waco, Texas.

The VA Regional Office denied Gardner's claim, and he sought review by the Board of Veterans' Appeals (BVA). The BVA held that in order for a veteran to receive disability compensation for an injury resulting from VA medical treatment under 38 U.S.C. § 1151 (Supp. III 1991) (formerly § 351[2]) and 38 C.F.R. § 3.358 (1992),[3]

> at least two elements must be present. First, there must be some demonstration in the record

[1] For simplicity, we refer to the Department of Veterans Affairs and its precursors, the Veterans' Administration and the Veterans' Bureau, as the "VA."

[2] The Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub.L. No. 102-40, § 402(b)(1), 105 Stat. 187, 238, and the Department of Veterans Affairs Codification Act, Pub.L. No. 102-83, § 5, 105 Stat. 378, 406 (1991), redesignated most of the sections of Title 38, United States Code, so that the first two digits of the section number correspond to the section's respective chapter number. To avoid confusion we cite the current sections.

[3] The BVA is bound by the regulations of the VA 38 U.S.C. § 7104(c) (Supp. III 1991).

> that the treatment rendered resulted in some untoward result or that the treatment was negligent or showed error in judgment, lack of proper medical skill or some other instance of indicated fault. Second, it must be shown that, as a result of the aforementioned accident, negligence, etcetera there was additional disability.

The BVA concluded that Gardner was not entitled to disability compensation, finding that he did not prove that he suffered injury as the result of negligent treatment or an accident occurring during his treatment. Gardner appealed the decision of the BVA to the Court of Veterans Appeals.

The Veterans Court held that 38 C.F.R. § 3.358(c)(3) impermissibly imposed a fault or accident requirement in addition to the prerequisites for relief set out in 38 U.S.C. § 1151. The court reasoned that the plain language of the statute lacked a fault or accident element, that the legislative history was ambiguous as to fault or accident, that Congressional reenactment of the statute while the regulation was in force was not Congressional ratification of a fault or accident element, and that no deference was owed the VA's interpretation. The Veterans Court struck down 38 C.F.R. § 3.358(c)(3) as contrary to 38 U.S.C. § 1151 and beyond the authority of the VA.[4] The Veterans Court therefore reversed the BVA's decision denying Gardner compensation and remanded for a redetermination of eligibility.

[4] 38 U.S.C. § 7261(a)(3)(C) (Supp. III 1991) requires the Court of Veterans Appeals to "hold unlawful and set aside . . . regulations issued or adopted by the Secretary . . . found to be . . . in excess of statutory . . . authority, . . . or in violation of a statutory right."

The Secretary appeals from this decision.

II.

The sole issue presented in this appeal is whether the regulation, 38 C.F.R. § 3.358(c)(3), which requires a veteran to prove that he suffered disability as the result of negligent treatment or an accident occurring during treatment, is an invalid implementation of 38 U.S.C. § 1151.[5] The resolution of this question depends on the construction of 38 U.S.C. § 1151, which is a matter of law that we review *de novo*. 38 U.S.C. § 7292(d)(1) (Supp. III 1991); *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed.Cir. 1991).

A.

"The starting point in interpreting a statute is its language, for 'if the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp. v. Shalala*, —— U.S. ——, ——, 113 S.Ct. 2151, 2157, 124 L.Ed.2d 368 (1993) (alteration omitted) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984)).

The statute at issue in this case, 38 U.S.C. § 1151, provides for compensation to veterans who are disabled by VA medical treatment or examination or vocational training. It states in pertinent part:

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[5] In the appeal to this court, no challenge can be made to the factual determinations that Gardner did not show that the VA treatment was negligent or that an accident occurred during treatment so as to satisfy the VA's regulation. 38 U.S.C. § 7292(d)(2) (Supp. III 1991).

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation . . ., awarded under any of the laws administered by the Secretary, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability or death compensation under this chapter . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

38 U.S.C. § 1151.

The interpretation of the statute asserted by the VA appears at 38 C.F.R. § 3.358 (1992). The regulation provides that a veteran must prove he suffered a disability, disease, or injury, or aggravation thereof, as the result of a specified VA service, and not merely coincidental with it. 38 C.F.R. § 3.358(c)(1). Furthermore, the VA will not pay compensation for "the continuance or natural progress" of a disease or injury treated by the VA. *Id.* § 3.358(b)(2). But the provision of the regulation at issue in this appeal and struck down by the Veterans Court requires the veteran to prove additionally that the VA treatment was faulty or that an accident occurred during treatment:

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of

> a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

38 C.F.R. § 3.358(c)(3).

Unlike the regulation, the statute does not on its face include an element of VA fault or accident as a condition to compensation. Pursuant to 38 U.S.C. § 1151, the VA "shall" award service-connected compensation where a veteran shows he has suffered an "injury, or an aggravation of an injury" and that this injury or aggravation is the result of one of four VA services: (1) hospitalization; (2) medical or surgical treatment; (3) vocational rehabilitation; or (4) an examination.

The statute has two limitations to the mandatory grant of disability compensation to a veteran undergoing one of the four services listed above. First, the injury or aggravation of injury must be "the result of" one of the services. Second, the injury or aggravation of injury must *not* be "the result of" the veteran's own willful misconduct. The statute does not expressly require the veteran to prove the poor nature or lack of quality of the treatment received, or the occurrence of some mishap during treatment. Rather, compensation must be paid where the veteran proves only that he suffered an injury as the

result of a specified treatment and not as the result of his own willful misconduct.

The Secretary argues that the statutory language "as the result of" is ambiguous because the statute "fails to define or explain, in any manner, what is meant by the words 'as the result of.'" From this the Secretary reasons, it is likely that "Congress, as evidenced by the legislative history of the statute, intended that the VA limit compensation payments to those veterans with disabilities proximately caused by VA fault or through accidents."

We reject, however, the Secretary's premise—that the statutory language must be deemed ambiguous because the statute does not contain an express definition of the words at issue. To be sure, Congress may define terms in a statute. *E.g.*, 38 U.S.C. § 1101 (Supp. III 1991). But Congress is not required to define each and every word in a piece of legislation in order to express clearly its will. A phrase appearing in the context of a statute may be unambiguous where it "has a clearly accepted meaning in both legislative and judicial practice," *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, ——, 111 S.Ct. 1138, 1147, 113 L.Ed.2d 68 (1991), even though it is not explicitly defined by the statutory text. Indeed, terms are defined in statutes often for the very reason that such terms would be ambiguous without a statutory definition. That a term is not defined in a statute does not mean that the term is *per se* ambiguous.

We are convinced that "as the result of" as used in 38 U.S.C. § 1151 mandates only a causation requirement. *See Webster's Third New Int'l Dictionary* 1937 (1971) (defining "result" as "a conse-

quence, effect, issue, or conclusion"). Under section 1151 the specified treatment must *cause* the injury or the aggravation of injury. And willful misconduct of the veteran may not be a cause of the injury or aggravation.

The Secretary tenuously argues that causation in this instance may be defined as fault. Causation and fault however are fundamental, distinct concepts in the law. *See generally* William L. Prosser, *Handbook of the Law of Torts* §§ 30, 37, 45, 46, 48 (1941). Congress knows how to legislate expressly liability for fault and negligence. *E.g.*, Act of Apr. 22, 1908, ch. 149, 35 Stat. 65 (liability of common carriers by railroad in cases of negligence) (codified as amended at 45 U.S.C. § 51 (1988)). Congress also knows how to legislate liability without fault. *E.g.*, Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901-950 (1988)). Moreover, section 1151 itself includes one culpability element: the injury or aggravation must not be the result of the *willful misconduct* of the *veteran*. Under this language the veteran's own negligence will not preclude him from receiving compensation. When section 1151 is read in its entirety it becomes evident that Congress's failure in section 1151 to require expressly the veteran to prove fault or accident occurring during treatment was both informed and intentional.

Finally, the VA's argument that causation incorporates fault or accident is belied by the facts that the BVA in its decision below could and did cleanly distinguish "two elements" for compensation—causation and fault or accident—and that the VA regulation 38 C.F.R. § 3.358 has causation considerations separate from the fault or accident requirement.

We therefore conclude that the Veterans Court correctly held that 38 U.S.C. § 1151 unambiguously does not require the veteran to prove that the VA treatment was faulty or that an accident occurred during the treatment.

B.

As noted above, the Secretary argues that from the legislative history it is likely that Congress intended a fault or accident element. Although "[r]ecourse to the legislative history of [section 1151] is unnecessary in light of the plain meaning of the statutory text," *Darby v. Cisneros*, —— U.S. ——, ——, 113 S.Ct. 2539, 2545, 125 L.Ed.2d 113 (1993), we may look to the legislative history "'to determine whether there is a *clearly expressed* legislative intention contrary to the statutory language.'" *Glaxo Operations UK Ltd. v. Quigg*, 894 F.2d 392, 395 (Fed.Cir.1990) (quoting *Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 629 (Fed.Cir.1989)). We emphasize that because the statutory language is clear, "we do not analyze th[e] history from a neutral viewpoint." *Id.* at 396. The Secretary must make an extraordinarily strong showing of clear legislative intent in order to convince us that Congress meant other than what it ultimately said. *See id.*

38 U.S.C. § 1151 has a long history. It was born in section 213 of the World War Veterans' Act, 1924, ch. 320, 43 Stat. 607, 623 (1924) ("1924 Act").[6] Prior to the 1924 Act, veterans could not

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[6] That section provided:

> That where any beneficiary of this bureau suffers or has suffered an injury or an aggravation of an existing injury as the result of training, hospitalization, or medi-

be compensated for injuries sustained as a result of VA medical treatment because such treatment was not service-connected.

The legislation was proposed by General Frank T. Hines, then-director of the United States Veterans' Bureau, as an amendment to the "war risk insurance act." *See World War Veterans' Legislation: Hearings on H.R. 7320 Before the House Committee on World War Veterans' Legislation*, 68th Cong., 1st Sess. 113 (1924) (hereinafter "*House Hearings*"). Each party cites in support of its respective construction of the 1924 Act the House committee hearings on House Bill 7320, which was enacted as section 213. These hearings have been cited often by the VA in its administration of the Act. In introducing the proposal, General Hines stated:

> [I]n cases of hospitalization for compensable diseases or injuries, where without fault of the patient, *as the result of accident or negligence of treatment or unskillfulness—things that must sometimes happen*—the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof. The Government having undertaken to bestow a benefit, has, in fact, inflicted a loss.

House Hearings, *supra*, at 113 (emphasis added).

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cal or surgical treatment, awarded to him by the director and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title shall be awarded in the same manner as though such disability, aggravation, or the death was the result of military service during the World War.

World War Veterans' Act, 1924, ch. 320, § 213, 43 Stat. 607, 623 (1924).

General Hines and Members of Congress then attempted to flesh out situations in which compensation would be payable:

> General HINES. . . . In the hospital, at the patient's consent, he may undergo a certain surgical operation, with the hope, on the best advice available, that it will overcome some disability, but instead of doing that it goes in the other direction. Now, he may have a considerable minor disability due to his service, but at the same time he finds himself totally disabled, and the bureau under the existing law has no way of compensating him.
>
> The CHAIRMAN. It might come from a spinal puncture done at his request?
>
> General HINES. That is true.
>
> The CHAIRMAN. Or an operation which was not successful?
>
> General HINES. That has occurred from a spinal puncture that I know of, and it seems to me manifestly unjust, that in good faith the man undergoes an operation, *the doctor does the best he can and without neglect*—
>
> The CHAIRMAN. And with the best medical advice.
>
> General HINES. With the best medical advice, *and still at the end of a certain period we find the man has a greater disability than he originally started with*, and we have no way of correcting in any measure that condition.
>
> The CHAIRMAN. In a certain number of cases from some operations lesions will occur which will incapacitate the patient also?

General HINES. And it may result—as we all know, *operations are never certain*—in death.

. . . .

Mr. RANKIN. Would the disability that they are being treated for have to rise to the dignity of being convincable? [sic] For instance, a great many fellows go to these hospitals to get examined and stay there a while until their case can be thoroughly examined. Suppose it was determined that they had no disability due to the service when they went there, but that they were injured in this process in some way, would this apply to them?

General HINES. *If they were injured*, for instance, in determining whether a man has or has not syphilis, *by a spinal puncture*—when they make the spinal puncture and get the results, they all seem to be satisfied whatever the result is—*if that results, as it might, that they would paralyze a man under that operation, under those circumstances that man would be entitled to compensation.*

House Hearings, supra, at 114 (emphasis added).

The record of House hearings also contains a letter from General Hines to the House committee, in which General Hines wrote:

> I concur in the principle that authority should exist for compensating the cases of disability due to the hazards of training upon the general theory and principle of the *workmen's compensation act* [no-fault liability]. I would extend the principle beyond this particular proposal to include also ratable disabilities *incurred without fault and due to the hazards of medical and surgical treatment.*

House Hearings, supra, at 122 (emphasis added).

Finally, General Hines reiterated before the Senate what he had said before the House:

> [A] man submitted to a spinal puncture in one of our hospitals, to determine whether his [service-connected] disability was due to misconduct or not, and as the result of the spinal puncture he was injured for a period, paralyzed practically, on one side, and he is claiming now that he is greatly disabled. There is no way for the bureau, even though *that mistake* was made by them, to in any way compensate him.

Veterans' Bureau Codification Act: Hearings on S. 2257 Before the Subcommittee of the Senate Committee on Finance, 68th Cong., 1st Sess. 102-03 (1924) (emphasis added).

Until 1926, the VA did not impose any fault or accident showing as a condition to compensation. In 1926, the VA promulgated Regulation No. 137 under the direction of General Hines. That regulation provided that "[c]ompensation . . . will not be paid for the ordinary residuals of disease or injury following *accepted* medical treatment nor for the continuation of the original disability where improvement can not be effected by *approved* medical or surgical treatment." VA Regulation No. 137, sec. 7701 (1926) (emphasis added), *reprinted in* United States Veterans' Bureau, *Regulations and Procedure: Active and Obsolete Issues as of December 31, 1928*, at 174 (1930) (hereinafter "*Obsolete Issues*"). In 1927, the regulation was revised to exclude "[t]he

usual after results of *approved* medical care and treatment *properly* administered." VA Regulation No. 167, sec. 7701.B(4) (1927) (emphasis added), *reprinted in Obsolete Issues, supra*, at 194.

Although the regulations used such language as "approved" and "properly administered" medical care, it does not appear that the VA actually excluded disability claims where the veteran could not prove fault or accident. For example, the Attorney General advised the VA that the phrase "as the result of" required a straightforward causal connection with no element of fault or accident on the part of VA personnel. *See* 35 Op. Att'y Gen. 76 (1926); 36 Op. Att'y Gen. 61, 63 (1929) ("It is probably impossible to state a general rule for determining whether such a causal connection is present in any given case."). In 1930, the Comptroller General considered the question whether a veteran who had suffered dermatitis as the result of x-ray treatment for service-connected tuberculosis could receive compensation. The Comptroller advised the Director of the Veterans' Bureau that such disability would be compensable; there was no discussion of the nature or quality of the specific x-ray treatments given. Comptroller General Decision No. A-31895, 9 Comp. Gen. 515 (1930). Nevertheless, in language broader than necessary, the Comptroller General stated that "[t]he plain intent of section 213 . . . was to afford veterans some measure of compensation in those cases in which the disability arises through accident, carelessness, negligence, lack of proper skill, error in judgment, etc., on the part of any person charged with a duty respecting the hospitalization, or medical or surgical treatment. . . ." *Id.* at 516.

In 1933, Congress repealed the World War Veterans' Act. *See* Economy Act, ch. 3, § 17, 48 Stat. 8, 11 (1933). Thereafter, in March 1934, Congress substantially reenacted the provisions of the repealed law. Act of Mar. 28, 1934, ch. 102, § 31, 48 Stat. 509, 526 ("1934 Act").[7] The Congressional discussion preceding the enactment of the 1934 Act expressed the same commitment to compensation as that present in the discussion preceding the enactment of the 1924 Act:

> Mr. STEIWER. The first proposal is that where, in a veterans' hospital, a veteran is disabled by reason of mistreatment on the part of a Government agent, as in a case of malpractice by a Government surgeon, that disability shall be treated just the same as a war disability, and the veteran shall be compensated in the same way.
>
> Mr. BORAH. Are we undertaking to cover cases of malpractice upon the part of physicians?

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[7] That section stated:

> Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury, as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits to World War veterans, or as the result of having submitted to examination under authority of the War Risk Insurance Act or the World War Veterans' Act, 1924, as amended, and not the result of his misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, . . . benefits . . . shall be awarded in the same manner as if such disability, aggravation, or death were service connected within the meaning of such laws. . . .

Act of Mar. 28, 1934, ch. 102, § 31, 48 Stat. 509, 526.

Mr. STEIWER. Incidentally, we would. Of course, what we are trying to do is to protect the men who suffer from malpractice at the hands of Veterans' Administration physicians. That was in the old law; it was repealed by the Economy Act; and the effort at this time is to restore it.

. . . .

Mr. BORAH. . . . I am curious to know how it is provided that we shall determine that there has been a case of malpractice.

Mr. STEIWER. Mr. President, I do not know that the Veterans' Administration can determine that there has been a case of malpractice, but they do determine that the veteran is suffering from disability, and in some cases they have determined that the disability was caused by or aggravated by some mistreatment upon the part of the veterans' agencies. I do not think there has ever been a trial of a [VA] doctor to determine malpractice. . . .

78 Cong. Rec. 3289-90 (Feb. 27, 1934).

For the first time, in August 1934, the Administrator of the VA took the position that compensation was payable under the 1934 Act *only* where the disability arose through an accident or negligence. Department of Veterans Affairs, Precedential Op. Off. General Counsel 99-90, at 7 (1990). The Administrator based his interpretation of the 1934 Act on the fact that it was a reenactment of the 1924 Act, and that in 1930 the Comptroller General had stated that the 1924 Act was intended to compensate fault and accident. *Id.* From about 1934 to the present

the VA has promulgated various regulations requiring fault or accident, culminating in the regulation at issue today. *See id.* at 7-8.[8]

The legislative history convincingly demonstrates that Congress's paramount concern was to compensate veterans injured by VA medical treatment. The Congressional discussion preceding enactment includes at times the words fault and accident, and at other times speaks of no-fault liability. The resulting statute omits fault and accident from its language. Congress recognized that injuries would likely occur where the treatment was negligent or where an accident occurred during treatment, but there is no indication whatsoever in the legislative history or in the resulting legislative enactment that Congress intended to place on the veteran the complex and difficult burden of proving that negligence or an accident actually occurred during treatment as a condition to compensation. The World War Veterans' Act was remedial legislation and as such should be

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[8] The 1934 Act was amended several times, resulting in the present enactment, 38 U.S.C. § 1151; statutory language relevant to this appeal, however, was not changed. *See* Act of Oct. 17, 1940, ch. 893, § 12, 54 Stat. 1193, 1197 (adding compensation for examinations); Act of Mar. 24, 1943, ch. 22, § 3, 57 Stat. 43, 44 (adding compensation for vocational rehabilitation); Act of Sept. 2, 1958, Pub.L. No. 85-857, 72 Stat. 1105, 1124 (codifying the law at 38 U.S.C. § 351); Act of Oct. 15, 1962, Pub.L. No. 87-825, § 3, 76 Stat. 948, 950 (providing offset for recovery under Federal Tort Claims Act); Veterans Disability Compensation and Survivor Benefits Act of 1976, Pub.L. No. 94-433, § 404, 90 Stat. 1374, 1379: Veterans' Compensation and Program Improvements Amendments of 1984, Pub.L. No. 98-223, § 213, 98 Stat. 37, 46; Department of Veterans Affairs Codification Act, Pub.L. No. 102-83, § 5, 105 Stat. 378, 406 (1991).

construed broadly to the benefit of the veteran. *See Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967). This is all consistent with Congress's enactment of a statute that plainly requires injury and causation but plainly does not require proof of fault or accident.

The critical inquiry for compensation under 38 U.S.C. § 1151 therefore is, assuming no willful misconduct by the veteran, whether the veteran was injured by the treatment. If he was, then as the statute and legislative history make clear, regardless of VA fault or accident, the veteran is to be compensated because the VA "having undertaken to bestow a benefit, has, in fact, inflicted a loss." Because the legislative history does not reveal a clearly expressed legislative intent to require a veteran in order to receive compensation to show that he suffered an injury as the result of faulty medical treatment or an accident occurring during treatment, the Secretary has not made the "'*extraordinary showing* of . . . intentions'" necessary to warrant departure from the plain meaning of the text. *Glaxo Operations*, 894 F.2d at 396 (emphasis in original) (quoting *Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479, 482, 83 L.Ed.2d 472 (1984)).

C.

The Secretary argues that this court must defer to the VA's long-standing regulations purporting to interpret the statute as requiring fault or accident. For several reasons we will not defer. As discussed above, Congress has spoken clearly on the issue of fault or accident, and unambiguously has not required it. Congress has not left any gap in the statu-

tory language that might give the Secretary discretion to require fault or accident. Therefore we owe no deference to the VA's interpretation. *Glaxo Operations*, 894 F.2d at 398.

In addition, the VA's interpretation of the statute was not contemporaneous with the statute's enactment. Rather, the VA first absolutely required fault or accident some 10 years after the enactment of the original statutory provision, and 5 months after reenactment of the statute which the VA has always maintained was the same in scope as the original enactment. In such circumstances the force of the regulation is substantially weakened. *See id.* at 398-99.

Finally, we reject the Secretary's urging for deference based on the fact that the regulation or its equivalent is long-standing. *See Horner v. Andrzjewski*, 811 F.2d 571, 574 (Fed.Cir.1987). Although the regulation has existed for nearly 60 years, it was not expressly made judicially reviewable until 1988. In that year, Congress established under Article I of the Constitution the Court of Veterans Appeals to provide for the first time judicial review of decisions of the VA. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105 (1988). Jurisdiction for appeals from the Court of Veterans Appeals lies exclusively in this court. *Id.* Until 1988, as stated by Congress, the VA stood "in 'splendid isolation as the single federal administrative agency whose major functions [we]re explicitly insulated from judicial review.'" H.R.Rep. No. 100-963, 100th Cong., 2d Sess. 10, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5791. Many VA regulations have aged nicely simply because Congress took so long to provide for

judicial review. The length of such regulations' unscrutinized and unscrutinizable existence, however, does not in itself form a basis for us to presume they are valid and therefore defer to them. If anything, Congress's lengthy deliberation and carefully crafted scheme for judicial review of VA regulations counsels for vigorous review.

We also reject the Secretary's argument that Congress ratified the fault or accident element in 1934 when it reenacted the 1924 Act. Even if, as the Secretary argues, in this case Congress could be presumed to be aware of the VA's regulatory interpretations of the statute, *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n. 66, 102 S.Ct. 1825, 1841 n. 66, 72 L.Ed.2d 182 (1982), there has been no showing that the VA definitively interpreted the statute as requiring proof of fault or accident prior to the time Congress reenacted the statute. Reenactment occurred on March 28, 1934, while the Administrator's definitive, restrictive stance was taken later in August of that year. Nor does the Congressional discussion preceding reenactment cited by the parties even refer to the VA regulation. As the discussion above indicates, Congress initially enacted a broad statute that would encompass instances of fault and accident leading to injury, but was not limited to them. That the VA deemed fault or accident important at the time of reenactment does not show that Congress intended to so limit the statute. Consequently, "[i]n such circumstances we consider the [1934] reenactment to be without significance." *United States v. Calamaro*, 354 U.S. 351, 359, 77 S.Ct. 1138, 1144, 1 L.Ed.2d 1394 (1957); *see Pierce v. Underwood*, 487 U.S. 552, 566-68, 108 S.Ct. 2541, 2550-51, 101 L.Ed.2d 490 (1988).

The VA required Gardner to prove that as the result of his medical treatment he suffered an injury or an aggravation of an injury, *and* either that the particular treatment was performed with negligence or that during the treatment an accident occurred. Congress, however, did not require the veteran to discover and prove precisely what happened during his treatment (*e.g.*, that the VA personnel acted negligently or that a mishap occurred), a time when perhaps the veteran was not even conscious. To impose on the veteran the obligation to prove an element of accident or fault is to curtail drastically the statutory right conferred on him by 38 U.S.C. § 1151. The Secretary tells us not surprisingly that a no-fault scheme is more expensive than a fault-based scheme. That however would be Congress's concern. The VA's desire to pay less compensation than Congress mandated could not authorize the extra-statutory legislation embodied in 38 C.F.R. § 3.358(c)(3). "The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." *Miller v. United States*, 294 U.S. 435, 440, 55 S.Ct. 440, 442, 79 L.Ed. 977 (1935). We hold that 38 C.F.R. § 3.358(c)(3) is therefore invalid.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF
VETERANS APPEALS

No. 90-120

FRED P. GARDNER, APPELLANT

v.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE

On Appeal From the Board of Veterans' Appeals

(Argued August 7, 1991 Decided November 25, 1991)

Before NEBEKER, *Chief Judge*, and HOLDAWAY and IVERS, *Associate Judges*.

NEBECKER, *Chief Judge*: Appellant, Fred P. Gardner, seeks reversal of a January 26, 1990, Board of Veterans' Appeals' (BVA) decision denying him entitlement to Department of Veterans Affairs (VA) benefits. The BVA ruled against appellant pursuant to 38 C.F.R. § 3.358(c)(3) (1990), on the grounds that his injuries were not a result of negligence or accident on the part of his VA doctors. We hold that 38 C.F.R. § 3.358(c)(3) is contrary to statutory au-

thority and outside the scope of the VA's authority. We therefore remand the case to the BVA for further proceedings on the claim.

Appellant, a veteran of World War II, underwent back surgery for a non-service-connected back condition in June of 1986 at a VA medical facility. R. at 1. He asserts that his left leg suffered severe nerve and muscle damage as a result of surgery. On November 18, 1988, he filed a claim for compensation, under 38 U.S.C. § 1151 (formerly § 351), alleging that his left leg condition was secondary to the 1986 back surgery. R. at 263. The V.A. Regional Office (RO) denied his claim by a rating decision on January 26, 1989, finding no indication of negligence in the surgical procedure. R. at 267, 268. On September 5, 1989, the VARO confirmed this rating action, relying on 38 C.F.R. § 3.358(c)(3), which requires either accident or fault on the part of the VA for the veteran to receive compensation for increased disability for any aggravation or injury resulting from treatment at a VA facility. The BVA affirmed the RO decisions on January 26, 1990, stating, "we do not find evidence of fault on the part of the VA, or of the occurrence of an unforeseen, untoward event, resulting in permanent additional disability. Accordingly, entitlement to the benefits requested is not demonstrated." R. at 303. Appellant subsequently appealed to this Court under 38 U.S.C. § 7266 (formerly § 4066).

Analysis

Resolution of appellant's claim requires the Court to focus on whether 38 C.F.R. § 3.358(c)(3) properly implements 38 U.S.C. § 1151 by including an

element of fault. Section 1151 reads in pertinent part:

> Where any veteran shall have suffered an injury or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation . . . not the result of the veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

The regulation at section 3.358(c)(3), which interprets the statute, reads in pertinent part:

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of VA. However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from VA hospitalization or medical or surgical care.

Section 7261(a)(3)(C) (formerly § 4061(a)(3)(C)) of title 38 requires the Court to "hold unlawful and set aside . . . rules and regulations issued or adopted by the [Secretary] . . . found to be . . . in

excess of statutory jurisdiction, authority, . . . or in violation of a statutory right." Determining whether section 3.358(c)(3) is in violation of statutory authority involves examining the language of the statute, and the interpretation given it by its administering agency. *See Brock v. Writer's Guild of America West, Inc.*, 762 F.2d 1349, 1353 (9th Cir. 1985).

The Language of the Statute

Determining a statute's plain meaning requires examining the specific language at issue and the overall structure of the statute. *Bethesda Hospital Assn. v. Bowen*, 485 U.S. 399, 403-405 (1988). Here, the language of the statute provides that any veteran who has a disability incurred or aggravated during the course of a VA-authorized health examination, treatment, or vocational rehabilitation is entitled to have that disability treated as service-connected. Both the parties and amici agree that, under a literal reading, the statute's language does not indicate an element of fault. Appellee's Response to Order of the Court to File a Supplement Memorandum (App. Resp.) at 4, and brief of J. Michael Hannon, amicus curiae (Hannon brief) at 5. This plain meaning must be given effect unless a "literal application of [the] statute will produce a result demonstrably at odds with the intention of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982).

The Secretary focuses on the language "injury resulting in additional disability" to support the argument that giving full play to the plain meaning of section 1151 would lead to ludicrous results. App.

Resp. at 5. This language, according to the Secretary, could encompass *any* change in the veteran's physical condition as a result of a medical procedure. For example, a non-service-connected disability, such as diabetes, could be converted into a service-connected disability if the disease led to amputation of an extremity. Such a loss could then be construed as an injury resulting in an additional disability and, therefore, be compensable under the plain language of the statute.

The "absurd result" exception to the plain meaning rule is, however, narrow and limited to situations "where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring). Absent an absurd result, the plain meaning of the statute will be applied unless such an application is contrary to the apparent intention of Congress. *Thompson/Center Arms Co., A Div. of the K.W. Thompson Tool Co. v. United States* 924 F.2d 1041, 1044-45 (Fed. Cir. 1991) ("[o]nly very clear evidence of contrary legislative intent can displace the plain meaning of a statute").

Furthermore, as Amicus Hannon points out, it is not unlikely that Congress designed a no-fault statute given its experience in enacting legislation concerning both common law negligence and the no-fault approach to liability. Hannon brief at 5. *See, e.g.*, 28 U.S.C. §§ 2671-2680 (1988) (Federal Torts Claim Act); 33 U.S.C. §§ 901-950 (1988) (Longshore and Harbor Workers' Compensation Act).

The Secretary argues that the language of the statute indicates an intent to limit the applicability

of section 1151 to cases in which fault can be demonstrated on the part of the Department or its agents. According to the Secretary, statutory language precluding compensation when the *veteran* is at fault implies that compensation is payable only when VA personnel are at fault. We do not find such an implication. The statute imposes only two limitations on the granting of service-connected benefits; first, as long as the injury or aggravation occurs "as a result of" exposure in one of four circumstances and, second, is not a "result of such veteran's willful misconduct," benefits will be made available. 38 U.S.C. § 1151. This language reveals that Congress considered the issue of fault while drafting the statute and suggests that, although fault of the veteran is relevant to a determination of eligibility for compensation, the fault of VA personnel is not. As the Supreme Court has noted, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

The Secretary further argues that section 358 (c)(3) does accommodate no-fault, non-negligent situations since it allows recovery when injury is caused by "accident." The Secretary's definition of "accident", however, does not include certain ill effects which may flow from surgery even though the operation is performed with the greatest possible degree of skill and precaution and no one is at fault. Although allowing recovery when injury is the result of accident increases the number of cases compensable under section 1151, foreseeable consequences of

medical care and treatment, no matter how remote, are still excluded under section 358(c)(3). The plain language of section 1151 places no such limitations on recovery.

Legislative History

Where a statute's language is plain, and its meaning clear, no room exists for construction. There is nothing to construe. *See Lewis v. United States*, 92 U.S. 618 (1876). Yet, the Secretary urges us to peruse the legislative history of section 1151 for proof that the plain meaning of section 1151 was not intentional. Legislative records contemporaneous with section 1151's precursor, section 213 of the World War Veterans' Act, Pub. L. No. 68-242, 43 Stat. 607 (1924), contain little or no congressional comment with respect to that section of the Act. The Secretary points to statements made by General Frank T. Hines, then Director of the Veterans' Bureau, which mentioned the need for a provision to compensate veterans hurt through medical negligence. *World War Veterans' Legislation: Hearings before the Comm. on World War Veterans' Legislation*, 68th Cong., 1st Sess., 113 (1924). In those same hearings, however, General Hines also made comments recommending a no-fault statute. *Id.* at 114. The Secretary's arguments are not persuasive.

Finally, the Secretary asserts that congressional failure to modify the VA's interpretation when it amended section 1151 signaled implicit congressional approval of section 3.358(c)(3). Although at times "[c]ongressional reenactment of a statute can strengthen a regulation's claim to validity, reenactment cannot save a regulation which contradicts the requirements of the statute itself," *i.e.*, the statute's

plain meaning. *Horner v. Andrzjewski*, 811 F.2d 571, 575 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 912 (1987). Reenactment of section 1151, therefore, could not have validated or ratified 38 C.F.R. § 3.358 (c)(3), where the language of the regulation continued to be inconsistent with the statute's plain meaning. *See Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936) (a regulation not in harmony with authorizing statute is a mere nullity).

Administrative Agency's Interpretation

The last step of the Court's inquiry involves examining the administrative agency's interpretation of section 1151. Section 501(a) of title 38, United States Code, gives the Secretary authority to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the [VA] and are consistent with those laws." 38 U.S.C. § 501(a), Pub. L. No. 102-83, § 501(2)(a), 105 Stat. 378, 386 (1991).

Given that authority, the Secretary encourages the Court to defer to the VA's interpretation of Section 1151, citing to the principle that great weight is attached to the construction given a statute by an administrative agency. *United States v. Jackson*, 280 U.S. 183 (1930). The Secretary fails to recognize that although courts frequently grant deference to an administrative agency's interpretation of an applicable statutes, this is true only when the statute is unclear. *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981). Furthermore, even where coutrs grant deference, they are not bound by the administrative agency's construction: "the courts are the final authorities on issues of statutory construction." *Id.* at 32.

Therefore, given the plain meaning of section 1151, and the inconsistency of the administrative agency regulation with the statute, the plain language of section 1151 must be implemented. *See, e.g., Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1559 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989); *International Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697, 719 (D.C. Cir. 1987). The Court holds 38 C.F.R. § 3.358(c)(3) unlawful as exceeding the authority of the Secretary and in violation of the statutory rights granted to veterans by Congress under section 1151. Accordingly, the decision of the BVA is REVERSED and the matter is REMANDED for further proceedings.

Special Appreciation

The Court is indebted to Mr. J. Michael Hannon, esq., of Thompson, McGrail, O'Donnell & Harding, who, on the court's request, wrote an amicus brief and presented oral argument. His superb analysis of the issues involved was of tremendous value to the Court and refuted the argument, often advanced by attorneys unfamiliar with veterans' benefits law, that the complexity of the law places them at a considerable disadvantage. The Court also expresses its thanks to counsel for the Secretary and to the Paralyzed Veterans of America, the National Veterans Legal Services Project, and the Vietnam Veterans of America for their significant contributions.

APPENDIX C

UNITED STATES COURT
OF VETERANS APPEALS

No. 90-120

VA File No. 20 066 280

FRED P. GARDNER, APPELLANT

v.

EDWARD J. DERWINSKI,
Secretary of Veterans Affiairs, APPELLEE

[Entered Jan. 13, 1992]

JUDGMENT

The opinion heretofore entered in this case being a decision of the Court,

Judgment is hereby entered in accordance therewith, this 10th day of January, 1992.
Dated: Jan. 13, 1992

FOR THE COURT:

/s/ Robert F. Comeau
ROBERT F. COMEAU,
Clerk of the Court

APPENDIX D

[LOGO]

C 20 066 280

BOARD OF VETERANS APPEALS
Washington, D.C. 20420

Docket No. 89-21 827

IN THE APPEAL OF FREDDY P. GARDNER

FINDINGS AND DECISION

[Date Jan. 28, 1990]

THE ISSUE

Entitlement to benefits pursuant to 38 U.S.C. 351 for additional disability of the left lower extremity caused by treatment rendered by the Department of Veterans Affairs during hospitalization from June 16, 1986, to July 10, 1986.

REPRESENTATION

Appellant represented by: Veterans Commission, Texas

WITNESS AT HEARING ON APPEAL

Appellant

CONSULTATIONS BY THE BOARD

Nancy Phillips, Staff Legal Adviser

CONTENTIONS

The appellant contends that as a result of back surgery, he developed severe nerve damage in the left leg, resulting in pain, atrophy, and weakness; that, since the surgery, his left ankle is severely impaired, and that he now has to wear a leg brace.

THE EVIDENCE

The appellant had active service from April 1953 to January 1955.

The appellant was admitted to a Department of Veterans Affairs (VA) hospital on April 23, 1986, with sensory neuropathy involving the lower extremities. Electromyographic studies of the lower extremities showed a radiculopathy, bilaterally, at L5, S1 with the possibility of spinal stenosis and degenerative joint disease. A CAT scan was compatible with a large central herniated disc L4-L5. On orthopedic evaluation, it was recommended that a series of caudal blocks be performed. He derived benefit from the spinal blocks, and was discharged on May 17, 1986. The diagnoses included large central herniated disc at the L4, L5 level.

The appellant was admitted to a VA hospital on June 16, 1986. He stated that the caudal blocks had helped somewhat, but he could still not walk to any degree without pain. A myelogram showed a large central herniated disc at the L4-5 level. On June 20, 1986, he underwent complete laminectomy of L4-5 with excision of a large herniated nucleus pulposus at L4, centrally. Pathologic findings included marked constriction at the L4-5 level of the spinal cord with a vary large centrally herniated nucleus pulposus at the L4 level causing increase in the spinal stenosis.

Postoperatively, the appellant did well. He was gradually mobilized. At the time of discharge, on July 10, 1986, he was ambulatory with the assistance of a cane. He had slight dorsiflexor weakness, primarily in the extensor hallucis longus of the left foot, which decreased during the hospital stay. At the time of discharge, it was felt that his dorsiflexors were strong. He had slight difficulty with walking because of perceived weakness in the left ankle. The final diagnoses included herniated nucleus pulposus at L4 with resultant spinal stenosis at L4-5 inner spaces.

An August 1986 statement from J. Lindsay, M.D., reflects that the appellant was confined to a nursing home and was totally disabled. Sciatic neuritis continued in spite of disc surgery.

The appellant underwent a VA examination for compensation purposes in October 1986. He indicated that, since surgery in 1986, he had numbness in the legs and used a cane for walking. He was living in a nursing home. He felt "electric shocks" going down the feet. He also had underarm crutches. He had weakness of the left ankle and foot. On examination, he limped to the left. He walked with the assistance of a cane and a left ankle brace. Examination of the lumbosacral spine revealed normal range of motion. There was pain on lateroflexion. Straight leg raising was positive at 65 degrees, bilaterally. There was tenderness to palpation over the lumbosacral area and the sciatic notches. Examination of the left ankle showed no heat, effusion or erythema. There was lateral/medial instability present. Range of motion was normal. Sensory examination was within normal limits. There was subjective numbness over both legs.

There was muscular wasting of the left gastrocnemius and anterior tibialis. There was normal range of motion. The appellant was wearing a hard plastic ankle brace. Ankle jerks were 1 plus on the right and 1 plus/1 minus on the left. Motor examination of the left leg and foot was Grade IV/VI.

X-rays of the left ankle showed no significant abnormality. The diagnosis was status postoperative herniated disc L4-5 with residuals; and degenerative joint disease of the left ankle with instability and mild muscular wasting of the left gastrocnemius and anterior tibialis.

VA outpatient treatment records dated from September 1986 to May 1989 reflect that on orthopedic evaluation in May 1989, it was reported that postoperatively, the appellant had suffered dorsiflexion weakness and progressive atrophy of the left calf. He also had lateral ankle instability secondary to weak ligaments of the left ankle. This was a preexisting condition, weakened by leg musculature. The assessments were weak musculature of the left leg secondary to surgery in 1986; an exacerbation of ankle instability secondary to leg weakness. It was recommended that bracing be continued.

A hearing was held before the originating agency in July 1989. The appellant's testimony was essentially an elaboration of the contentions reported earlier in this decision. A transcript of the hearing is on file.

THE LAW AND REGULATIONS

Where a veteran suffers an injury, or aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or examination, and such injury

or aggravation results in additional disability or death, compensation may be awarded in the same manner as if such disability or death were service connected. (38 U.S.C. 351)

Compensation may not be payable for either the contemplated or foreseeable results of approved medical or surgical care properly administered, no matter how remote, where the evidence does not show that the additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment or other instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an accident (an unforeseen, untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care. (38 C.F.R. 3.358(c)(3))

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. A reasonable doubt is one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded. (38 C.F.R. 3.102)

DISCUSSION AND EVALUATION

For entitlement to benefits under the provisions of 38 U.S.C. 351, at least two elements must be present. First, there must be some demonstration in the record that the treatment rendered resulted in some untoward result or that the treatment was negligent or showed error in judgment, lack of proper medical skill or some other instance of indicated fault. Second, it must be shown that, as a result of the aforementioned accident, negligence, etcetera there was additional disability.

In this case, it is argued that as a result of the decompressive laminectomy L4-5 in June 1986, the appellant sustained nerve damage affecting the left leg and ankle. A review of the hospital records shows some slight postoperative left foot dorsiflexor weakness, and subsequent records show atrophy of the left calf and instability of the ankle. However, there is not found in the hospital records any indication that treatment afforded the appellant was in any way negligent, or at variance with sound medical practice, or was otherwise at fault. Nor can it be concluded from the medical record that the surgery caused an untoward result in the sense contemplated by the law and regulation. That is to say, weakness of dorsiflexion is a common, foreseeable result of such surgery. Postoperatively, there was subsequently shown left calf and ankle weakness. From the clinical record, we conclude that this weakness was caused by instability of the left ankle, and was not in any way related to the decompressive laminectomy.

It it also argued that there was increased severity of the left ankle disability as a result of the surgery or

residuals thereof. However, it has not been objectively demonstrated that the underlying left ankle disability has undergone an increase in severity. Additionally, the Board is unable to conclude from the record that there is a causal relationship between the decompressive laminectomy or residuals thereof, and any increased symptomatology of the left ankle. This conclusion is reached after considering that no more than minimal sciatic neuropathy was shown after the appellant's discharge from the hospital in July 1986.

To summarize, based on the clinical record beginning with the hospitalization during June and July 1986, we do not find evidence of fault on the part of the VA, or of the occurrence of an unforeseen, untoward event, resulting in permanent additional disability. Accordingly, entitlement to the benefits requested is not demonstrated. In arriving at this conclusion, we have considered the doctrine of reasonable doubt, but find no basis for an allowance of this claim.

FINDINGS OF FACT

1. The appellant was hospitalized at a VA facility from June 16, 1986, to July 10, 1986, for performance of a myelogram and a decompressive laminectomy of L4-5 with diskectomy and excision of herniated nucleus pulposus at I 4.

2. Instability of the left ankle, which was observed postoperatively, had been present prior to the hospitalization and did not undergo permanent increase in severity as a result of the aforementioned laminectomy.

3. Treatment rendered by the VA during the hospitalization in question was in accordance with sound

medical principles, and there is no additional permanent disability which was the result of accident, negligence, lack of skill or error in judgment.

CONCLUSION OF LAW

The appellant has not incurred or aggravated any additional disability as a result of surgical accident, or as a result of negligence, carelessness, lack of proper skill, error in judgment or other instance of indicated fault on the part of the Department of Veterans Affairs. (38 U.S.C. 351; 38 C.F.R. 3.102, 3.358(c)(3))

ORDER

Entitlement to benefits pursuant to 38 U.S.C. 351 for additional disability of the left lower extremity caused by treatment rendered by the Department of Veterans Affairs during hospitalization at a VA facility from June 16, 1986, to July 10, 1986, is denied.

/s/ Stephen L. Wilkins
STEPHEN L. WILKINS

/s/ H. Sterling, M.D.
H. STERLING, M.D.

/s/ Holly E. Moehlmann
HOLLY E. MOEHLMANN

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C. 4066, added by Public Law 100-687, a decision of the Board of Veterans Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans

Appeals within 120 days from the date of mailing of notice of the decision. The date which appears on the face of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans Appeals.

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Supreme Court, U.S.
FILED
MAR 10 1994
OFFICE OF THE CLERK

No. 93-1128

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

Jesse Brown, Secretary of Veterans Affairs,
Petitioner

v.

Fred P. Gardner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

A federal statute initially enacted in 1924 as part of the "war risk insurance act" provides disability compensation to veterans injured as a result of medical treatment administered by Department of Veterans Affairs personnel. The statute was initially passed to provide a worker's compensation-type benefit to veterans, without proof of fault. Beginning in 1934, however, the VA began promulgation of various regulations designed to restrict the compensation available to veterans under the statute. These regulations variously required the veteran to present evidence of some form of fault or accident in the medical treatment as a predicate to compensation. The question in this case is whether the Court of Veterans Appeals and the Court of Appeals for the Federal Circuit were correct in striking down the current regulation containing a fault requirement because it is inconsistent with the clearly stated intent of Congress contained in the straightforward no-fault language of the statute.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

Jesse Brown, Secretary of Veterans Affairs,
Petitioner

v.

Fred P. Gardner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Fred P. Gardner, a veteran of the Korean conflict era, underwent surgery at a VA medical facility in June of 1986 to relieve radiating back pain due to a herniated disc in the lumbar spine. While it is correct to say that the surgery was "successful in removing the herniated disc" (Pet. at 6), Mr. Gardner suffered a "bad result." Immediately after the surgery neurological damage manifested itself in his left leg. From the date of surgery, Mr. Gardner experienced severe nerve damage and muscular wasting in the left leg until he became completely disabled and was discharged to a nursing home. Today Mr. Gardner wears a leg brace, uses a cane, requires a wheel chair for hospital visits, and is disabled from employment.

Over two years after the surgery, Mr. Gardner filed a claim with the Waco, Texas, VA regional office [VARO] for disability compensation benefits afforded him by Congress under 38 U.S.C. § 1151, which provides in pertinent part as follows:

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of . . . medical or surgical treatment . . . and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to . . . the veteran, disability or death compensation under this chapter . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

The VA offers two major disability benefits programs: service-connected disability compensation, for injury or disease ordinarily incurred during service (generally referred to as compensation) and non-service-connected disability pension (generally referred to as pension). By operation of Section 1151, Mr. Gardner would have been eligible for service-connected disability compensation for this surgical injury in the form of a monthly payment designed to offset the degree to which the disability would impair his ability to earn a living.[1] The rate of compensation is set by a schedule with ten percentage grades of disability based on the seriousness of the injury, ranging from 0 percent to 100 percent. See 38 U.S.C. § 1155.[2] For fiscal year 1991, the VA paid to veterans and their dependents

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[1] Under Section 1151, benefits "shall be awarded in the same manner as if such disability . . . were service-connected." These benefits are sometimes referrred to as "quasi-service-connected benefits."

[2] The establishment of service connection even at the 0 percent level may also entitle a veteran to ancillary benefits such as public employment preferences, job retention rights, and basic VA health care. See, e.g., 38 C.F.R. Part 17. If service connection were established at a 50% level, the veteran would be entitled to medical treatment for all conditions. 38 U.S.C. § 1710(a)(1)(D).

over $12.13 billion in compensation benefits and over $3.9 billion in pension benefits. Annual Report of the Secretary of Veteran Affairs, Fiscal Year 1991 at 115.

Mr. Gardner's claim was denied by the VARO in Waco, Texas. Mr. Gardner then appealed pro se to the Board of Veterans' Appeals [BVA] in Washington, D.C., which also denied the claim. The record at the VARO and the BVA unmistakably demonstrates that Mr. Gardner suffered atrophy of the musculature of the left leg secondary to the surgery, and an aggravation of a pre-existing ankle instability due to that left leg weakness. Indeed, these findings were adopted by VA decisionmakers at every level of review and accepted by the BVA in its final decision. The adverse results from the surgery were confirmed in an examination by the treating surgeon conducted on May 9, 1989, for the purpose of assisting the VA in evaluating the claim. (C.A. App. at 121).

Throughout the proceedings before the VA, the only reason given for the rejection of Mr. Gardner's claim was his failure to prove fault or accident on the part of VA medical personnel, as required by the current VA regulation implementing Section 1151 benefits. That regulation provides in pertinent part as follows:

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen,

> untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

38 C.F.R. § 3.358(c)(3). Neither the VARO nor the BVA was free to decide the claim contrary to the terms of the existing regulation. 38 U.S.C. § 7104(c).

The Court of Veterans Appeals [COVA] reversed the BVA denial of benefits in a unanimous three-judge opinion authored by Chief Judge Nebeker. The decision focused on whether the VA properly implements Section 1151 benefits by requiring a showing of fault by the veteran under its regulation.[3] At that stage in the litigation, the Secretary agreed that a literal reading of the statute did not include an element of fault. (Pet. App. at 25a). Instead, the Secretary argued that giving full play to a literal reading of the statute would lead to a "ludicrous result." Id. He asserted that the words of the statute -- "injury resulting in additional disability" -- would require compensation for any change in the veteran's condition resulting from surgery, such as a surgical scar or the amputation of a gangrenous limb. The Secretary believed the fault requirement was necessary to preclude this assertedly absurd outcome resulting from a literal application of the statute.

[3] After the initial round of briefing, COVA ordered the parties sua sponte to address the issue of "whether the regulation at 38 C.F.R. § 3.358(c)(3) . . . with its inclusion of an element of fault is inconsistent with 38 U.S.C. § [1151]." Order, November 6, 1990. Thereafter, COVA invited supplemental memoranda from interested veterans' groups and appointed Mr. Gardner's present counsel of record as amicus curiae to that court. Order, March 15, 1991.

In rejecting this argument, COVA concluded there was insufficient evidence of any congressional intent to limit compensation to instances of VA fault, as the Secretary had accomplished by regulation. COVA observed that the statute imposes only two limitations on the granting of benefits: first, that the injury occurs "as a result of" medical treatment; and, second, that the injury must not be a "result of such veteran's willful misconduct." (Pet. App. at 27a). Reasoning from this structure of the statute, COVA concluded that Congress had considered the issue of fault and intentionally excluded it from the statute. COVA found that this conclusion was not contradicted by any of the legislative history. In fact, COVA observed that the legislative history surrounding the 1924 enactment was as compatible with a no-fault system as with a fault system. (Pet. App. at 29a). Finally, COVA rejected the Secretary's plea for deference to his interpretation of the statute, since the statute was plain on its face. Id.

On appeal to the Court of Appeals for the Federal Circuit, another unanimous panel affirmed the invalidity of the Secretary's fault-based regulation in the face of a new argument by the Secretary in that court. There the Secretary argued for the first time that the statute at issue was ambiguous. The Secretary suggested that the words of the statute -- "as a result of" -- were unclear and justified the adoption of the regulation requiring proof of fault as a predicate to compensation. The purpose of this change in tactics by the Secretary was to bring

Section 1151 under the deferential standard afforded an agency's interpretation of an ambiguous statute by Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). However, neither the Secretary nor his predecessors had ever in the 68 year history of the statute taken the position that the statute was ambiguous.

The Federal Circuit concluded that the language "as a result of" was not ambiguous and "mandates only a causation requirement." (Pet. App. at 7a). The Federal Circuit recognized that fault and causation are fundamentally distinct concepts in the law which Congress has routinely distinguished in other legislation. When read in its entirety, the statute makes clear that the preclusion of a fault element by Congress was both informed and intentional. (Pet. App. at 8a). The court also noted that the VA's own adjudication of Mr. Gardner's claim readily distinguished between these two elements of fault and causation.

The Federal Circuit similarly found from a review of the legislative history that "Congress's paramount concern was to compensate veterans injured by VA medical treatment." (Pet. App. at 17a). The court found no indication that Congress intended to place upon the veteran the "complex burden of proving negligence" as a condition of compensation. Id. Regarding the Secretary's request for deference to his regulatory interpretation, the Federal Circuit concluded that Congress had left no gap in the statutory mandate that would permit the exercise of discretion by

the Secretary to impose a fault requirement in the compensation process. The court need not defer to the Secretary's asserted "long-standing" interpretation of the statute because that interpretation was not contemporaneous with the statute's enactment. Finally, the court observed that VA regulations should be subjected to "vigorous review" because such regulations were never subject to judicial review until the creation of the Court of Veterans Appeals in 1988:

> Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations' unscrutinized and unscrutinizable existence, however, does not in itself form a basis for us to presume they are valid and therefore defer to them.

(Pet. App. at 20a).

SUMMARY OF THE ARGUMENT

Section 1151 as enacted by Congress provides in its plain language that a veteran injured as a result of VA medical treatment is entitled to compensation for that injury without having to prove fault of any kind. The application by the Court of Veterans Appeals and the Federal Circuit of routine and well established principles of statutory construction to the plain language of Section 1151 was manifestly proper and does not require review under any precedents of this Court. Under those circumstances, there is no justification for any reference to legislative history or to an asserted "long-standing" agency interpretation of Section 1151 based on the contrived arguments by petitioner that the statute is ambiguous. This is

particularly true where the benefits of that statute must be liberally construed by the VA in favor of the veteran and against the restrictive reading given the statute.

In any event, the legislative history is consistent with the plain meaning found by the courts below. The VA's own General Counsel on no less than two occasions has rendered opinions on this issue which are in conformity with the reasoning of the courts below and contrary to the position he now takes in this Court. Similarly, the asserted "long-standing" interpretation of Section 1151 by the VA, imposing an element of fault in Section 1151 claims, is in reality a confusing maze of ambiguity and conflict, as has been conceded by the VA's General Counsel as recently as 1990. This history of the VA's efforts to limit Section 1151 benefits is a perfect example of the chaos which follows from an agency's failure to adhere to the plain meaning of Congressional enactments.

Nor is there any reason for this Court to review the judgment below in order to correct the Federal Circuit's conclusion that regulations of the Secretary should be subject to "vigorous review." The courts having exclusive jurisdiction over decisions of the Board of Veterans' Appeals should employ a vigorous review of agency regulations. Congress has narrowly circumscribed the authority of the Secretary to promulgate only regulations that are "consistent with [the] laws." The six-year history of the Court of Veterans Appeals reflects an inability or unwillingness on the part of the VA to conform its practice to

judicial review. Under the circumstances, the standard set by the Federal Circuit is entirely appropriate. In any event, this standard does not preclude deference to VA regulations under appropriate circumstances.

REASONS FOR DENYING THE PETITION

The decision of the Court of Appeals is correct and reflects a routine application of well-recognized principles of statutory construction. The asserted economic impact of that decision does not merit review by this Court.

1. The statute unambiguously does not require a showing of fault by the veteran as a predicate to Section 1151 compensation.

The Secretary argues that enactment of the VA's fault-based regulation "involves a routine sort of statutory interpretation that is not precluded by the 'plain' language of Section 1151." (Pet. at 12). The Secretary contrives an argument that the words "injury" and "as a result of" as used in the statute by Congress are ambiguous and require the fault-based regulation. The VA, however, has never asserted these arguments as support for the regulation in the 66 years that preceded this litigation. The Secretary is seeking deference to an interpretation which is a "post hoc rationalization of government lawyers" and to an "inference[] derived from reading between the lines of an agency decision or excerpted from the brief of a government lawyer." National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. ___, 112 S.Ct. 1394, 1405 (1992) (White, J., dissenting); Motor

Vehicle Mfrs. Assoc. of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 50 (1983).

Far from being a "routine sort of statutory interpretation," the Secretary's regulation is directly contrary to an unambiguous statutory mandate that "would not warrant a different construction" or deference to an ill-conceived formulation of misguided agency policy. National Organization for Women, Inc. v. Scheidler, 114 S.Ct. 798 (1994). The petition also ignores the contrary position taken by the Solicitor General in this Court's decision in Conroy v. Aniskoff, 507 U.S. ___, 113 S.Ct. 1562 (1993), dealing with an interpretation of the Soldiers' and Sailors' Civil Relief Act of 1940. In that case, the Solicitor General as amicus curiae argued successfully as follows:

> [T]he unambiguous text of Section 525 renders legislative history irrelevant.
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> * * * * *
>
> And where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"
>
> * * * * *
>
> [E]ven if there were ambiguity in the statute, it would have to be resolved in favor of the service member "under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."

Brief for the United States as Amicus Curiae at 6, 9-10, and 21-22, Conroy v. Aniskoff, 507 U.S. ___, (1993)(No. 91-1353) (citations omitted).

Under 38 U.S.C. § 501(a) the Secretary is empowered only to enact regulations "necessary and appropriate to carry out the laws administered" and which are "consistent with those laws." This Court has previously reviewed the Secretary's authority under this statute and invalidated a regulation which constituted impermissible legislation by the VA. Miller v. United States, 294 U.S. 435, 439-440 (1935). That is exactly what the Secretary's enactment of Section 3.358(c)(3) constitutes in this case.[4]

The structure of the statute itself presumes a no-fault basis in that compensation "shall be paid" for injury suffered "as a result of" four different circumstances: (1) hospitalization; (2) medical or surgical treatment; (3) the pursuit of a course of vocational rehabilitation; or (4) the conduct of medical examination required by any provisions of Title 38. The VA fault requirement for medical care in one category is inconsistent with the absence of a requirement for fault in the other three categories. There are only two limitations to the mandatory grant of service-connected benefits under the statute, both of which deal with causation only. First, the injury or aggravation of an injury must be "as a result of" one of the four circumstances enumerated. Second, benefits are not available to a veteran where the cause of the injury is "the result of such

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[4] The Court of Veterans Appeals struck down the regulation under its own Congressional mandate to "hold unlawful . . . regulations issued or adopted by the Administrator . . . found to be in excess of statutory . . . authority . . . or in violation of statutory right." 38 U.S.C. § 7261(a)(3)(C).

veteran's own willful misconduct." While there are a multiplicity of additional factors -- including fault on the part of VA personnel or "accident" however defined -- which might be expected to operate in any of the four circumstances, none are mentioned in the statute as grounds for limiting the mandatory obligation of the Secretary to treat such injuries as service-connected. Nor is there an explicit or implicit grant of discretion to the Secretary to withhold service-connected benefits where the terms of the statute are met.

The simple and straightforward language of the statute is reinforced by the overall structure of the statutory scheme of veterans benefits. See Bethesda Hospital Assn. v. Bowen, 485 U.S. 399, 403-405 (1988). The parallel statutory provisions of Sections 1110 and 1131 governing entitlement to disability compensation for conditions arising out of wartime and peacetime service do not require the veteran to prove fault on the part of the service department, although their terms are nearly identical to Section 1151. Compensation entitlement is established under those sections as long as there is a simple temporal relationship between the incurrence of the disability and a period of active service. 38 U.S.C. § 105. In this regard, Section 1110 provides a guarantee of compensation to active military personnel for "disability resulting from personal injury suffered or disease contracted in line of duty . . . during a period of war." Similarly, Section 1131 provides a guarantee of compensation for active military personnel for "disability resulting from personal

injury suffered . . . during other than a period of war." Both Section 1110 and Section 1131 contain the allegedly ambiguous word "resulting" -- which, according to the Secretary, offends the plain meaning of Section 1151. Yet under these statutes, a veteran who suffers a surgical injury while in service receives service-connected compensation after discharge without proof of fault.

The Secretary has not promulgated any regulations incorporating a fault element into Sections 1110 and 1131. On the contrary, the VA has promulgated a regulation which guarantees compensation under Sections 1110 and 1131 for all disabilities which proximately flow from the original wartime or peacetime disability, also on a strictly no-fault basis. See 38 C.F.R. 3.310(a). Under these statutes and regulation, a veteran who receives treatment for a service-connected condition and suffers an additional injury, such as the one Mr. Gardner suffered, would receive compensation benefits for the surgical injury without being required to demonstrate fault.[5]

The outcome of the interplay of the Secretary's regulations -- imposing a fault requirement on Mr. Gardner but not on those who have service-connected injuries -- is that a veteran may obtain further compensation for disability caused by medical

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[5] The Secretary acknowledges this difference in his petition at 6 n.3, but he asserts that Section 1151 is to be distinguished from Sections 1110, 1121, and 1131 benefits based on the fault requirement. However, the four statutory provisions are virtually identical in form and wording. The fault requirement imposed on Section 1151 claims is derived solely from the Secretary's regulation and not the Congressional scheme.

treatment without fault only if the original disability for which care was sought is service-connected. However, a veteran identically situated -- but for the fact that the disability for which he seeks treatment is not service-connected -- may not receive service-connected compensation for the new disability caused by medical treatment, unless the veteran meets the complex burden of proving that a departure from standard medical practice caused the new disability. The disparity is highlighted by the fact that the veteran seeking treatment in a VA facility for a service-connected disability may have incurred that disability while on leave from active duty. For example, if Mr. Gardner -- while on active duty but on leave -- had slipped and fallen on the steps of his trailer home and suffered a herniated disc, any "bad result" of the subsequent in-service or post-service surgery would be treated as service-connected.

Because it is rational and proper to treat these two cases alike, it is reasonable to assume that Congress intended this result. Both veterans are compensated for the "bad result" of their medical care on a no-fault basis. That was the primary focus of Congress. In any event, as Chief Judge Nebeker recognized, it cannot be said that such an intent on the part of Congress was "impossible" or clearly absurd. (Pet. App. at 26a, citing Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring)). Nor is there any evidence of a contrary legislative intent to treat these classes differently. In his petition, the Secretary never addresses the

complete lack of evidence that Congress intended to treat the hospitalized veteran and the active duty person differently under identical circumstances. On the contrary, in O.G.C. Precedent Opinion 80-90 (July 18, 1990), his own General Counsel stated that Congress did not intend there to be a distinction between recipients of so-called "quasi-service-connected" benefits under Section 1151 and recipients of benefits under Sections 1110 and 1131. "If Congress had intended to preclude such payment, it would have expressed recognition of the inconsistency by specifically excluding such class of claimants." (C.A. App. at 124)[6]

The Secretary also argues that the word "injury" in the statute "could well include some connotation of fault or of an unforeseen and untoward occurrence." (Pet. at 10-11). As an argument that the statute is ambiguous, it is weakly put. The Secretary asserts that "no single dictionary definition can by itself supply an unambiguously correct meaning for the word in its statutory context." (Pet. at 11) (emphasis supplied). This begs the question. The "correct" meaning of the word "injury" -- whatever that may be in the view of the Secretary -- does not require or even suggest imposition of a fault requirement in the statute. Nowhere in the companion provisions of Section 1110 and 1131 -- or in the multiple provisions of the statutory scheme where the word is used elsewhere -- has either Congress or the

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[6] A Precedent Opinion of the General Counsel is conclusive within the Department on the issue addressed. 38 C.F.R. § 14.507.

Secretary seen fit to remedy this supposed ambiguity in the word "injury." For example, Congress employed a common sense use of the word "injury" to define "aggravation" in the statute: "A preexisting injury or disease will be considered to have been aggravated . . . where there is an increase in disability . . . ." 38 U.S.C. § 1153. The key to the application of Section 1151 is actually to determine whether the veteran has suffered an increase in disability. Under 38 C.F.R. § 3.358(b)(1) the VA simply conducts a comparison of the veteran's condition before the surgery with his condition after the surgery to determine whether there is additional disability, a fundamentally straight-forward process the VA engages in every day.

The Secretary seems to argue that the words "as a result of" also create an ambiguity. (Pet. at 11). However, there is no explanation by the Secretary as to why these words are ambiguous in and of themselves. Instead, the Secretary suggests that "it is by no means self-evident from the statutory text alone" that a statistical percentage of adverse complications resulting from appropriate treatment should be compensated. (Pet. at 11). Compensation for adverse surgical outcomes, however, is exactly what the text of the statute requires. And, indeed, that is exactly how the statute was administered at least in the first two years after its enactment. While the Secretary might believe that this outcome "should" be precluded, Congress has thus far not acted on his last request to amend the statute. See S. 2383,

102d Cong., 2d Sess. (1992); 138 Cong. Rec. S4040 (daily ed. March 20, 1992).[7]

The courts below agreed that the omission of an element of fault in the statute is no oversight. The 1924 precursor of Section 1151, Section 213 of the World War Veterans' Act, Public Law No. 68-242 (1924), was presented as a bill to amend the "war risk insurance" act. Hearings Before the House Committee on World War Veterans' Legislation, 68th Cong., 1st Sess. 113 (1924) [1924 Hearings]. Section 213 was clearly characterized at its inception as remedial legislation. See S. Rep. No. 397, 68th Cong., 1st Sess. 5 (1924). That the statute was part of an insurance program fortifies the observation of both courts below that Congress designed a no-fault scheme "given its experience in enacting legislation concerning both common law negligence and the no-fault approach to liability." (Pet. App. at 8a, 26a).

That Congress considered and rejected the concept of relative fault on the part of VA medical personnel is clear from the single exclusion of compensation benefits where the veteran is guilty of "willful misconduct." This demonstrates that the veteran is protected against even his own simple negligence, even

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[7] The VA's concern that compensation may be required for the amputation of a gangrenous leg to save the veteran's life is inappropriate. Not all disabilities which exist after medical or surgical treatment are compensable. If the resultant condition is the product of the "continuance or natural progress of disease or injuries for which the . . . hospitalization, etc., was authorized," that disability does not occur "as a result of" the medical or surgical treatment. 38 C.F.R. § 3.358(b)(2). Compensation is also denied where the additional disability is "merely coincidental" with the treatment. 38 C.F.R. § 3.358(c)(1).

though contributory negligence was a standard defense in fault-based systems in 1924. This no-fault approach is also consistent with both state and federal worker's compensation schemes. Congress cannot have overlooked a requirement of fault on the part of the VA where it carefully crafted such a modest exclusion to compensation based on the willful misconduct of the veteran. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983).

As the Solicitor General made clear in his brief as amicus curiae in Conroy v. Aniskoff, even if there were ambiguity in the statute, the Secretary is obligated to resolve that ambiguity in favor of the veteran "under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." King v. St. Vincent's Hosp., 502 U.S. ___, 112 S.Ct. 570, 574 n.9 (1991). See also Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946); Boone v. Lightner, 319 U.S. 561, 575 (1943). Indeed, in a similar context as we indicated above, the Secretary has recognized and applied this precept to the benefit of veterans. See O.G.C. Prec. Op. 80-90 (July 18, 1990), citing Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). His failure to have even considered this precept in this case is at least puzzling.

Finally, the fault requirement of the regulation is inconsistent with the entire policy of VA compensation as recognized by decisions of COVA and by enactments of Congress. The veteran is entitled to the benefit of the doubt in all proceedings. 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102 (1990); Gilbert v. Derwinski, 1 Vet.App. 49 (1990). The VA is required to apply a broad and liberal interpretation to its rules. 38 C.F.R. § 3.303(a). The VA has a duty to assist the veteran in the investigation and presentation of his case before the VARO and the BVA. 38 U.S.C. § 5107(a); Murphy v. Derwinski, 1 Vet.App. 78 (1990). Independent expert medical opinions are available in some cases. 38 U.S.C. § 5109. Congress has also concluded that for certain medical conditions, the veteran is entitled to a presumption of service connectedness in evaluating entitlement to compensation. 38 U.S.C. §§ 1112, 1116. Imposing the complex burden of proving malpractice as a predicate for compensation is at odds with the entire VA system of benefits.

2. As the Court of Appeals correctly observed, "[r]ecourse to the legislative history of [section 1151] is unnecessary in light of the plain meaning of the statutory text," quoting Darby v. Cisneros, 509 U.S. ___, 113 S.Ct. 2539, 2545 (1993).

While resort to legislative history is not justified in this case, even that history does not manifest a "clearly expressed legislative intent to the contrary" of the plain meaning of the statute that might warrant a different construction. National Organization for Women v. Scheidler, 114 S.Ct. at 806, quoting

Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). There is no such legislative mandate in this case. Indeed, at best the Secretary argues that the legislative history "raises at the very least a significant question as to whether Congress intended to enact a no-fault compensation scheme." (Pet. at 12). Such admitted ambiguity in the legislative history cannot justify review in this case.

The Secretary concedes in this Court, as he has throughout this litigation, that the legislative history surrounding the original enactment of the statute in 1924 supports both a no-fault scheme and a fault based scheme. (Pet. at 13). Of course, a no-fault scheme necessarily includes compensation for fault. Therefore, the contemporaneous evidence of congressional intent surrounding the 1924 enactment supports enforcement of the plain language of the statute. The Secretary, however, argues that the regulations enacted by the VA in 1926 and 1927 disclose a contemporaneous intent by the agency to require fault. (Pet. at 13-14). Even assuming these regulations are "contemporaneous" with the 1924 enactment, the Secretary parses these three regulations improperly. Regulations Nos. 137, 157, and 167 do not definitively preclude recovery in the absence of proof of fault or accident. Regulation No. 137 essentially precludes recovery for conditions arising out of the natural progress of the disease or injury being treated and acknowledges that recovery is available for additional injury resulting from treatment "improperly given." (C.A. App. at 102). There is no

requirement that fault be shown as a predicate to compensation. While No. 157 permits recovery in instances of fault, it does not preclude recovery in the absence of proof of fault. Regulation No. 167, on the other hand, actually liberalized the standard under No. 157 by providing that "[t]he usual after results of approved medical care and treatment properly administered will not be held as entitled to payment." (C.A. App. at 104). The Federal Circuit was correct to observe the lack of precision in this language and further observed that "it does not appear that [under any of these regulations] the VA actually excluded disability claims where the veteran could not prove fault or accident," citing two opinions of the Attorney General and an opinion of the Comptroller General. (Pet. App. at 14a). The court also noted that the VA did not take the position that proof of fault was an absolute prerequisite until August 1934. (Pet. App. at 16a).

The Secretary cites for support two adjudicatory opinions of the VA from 1928 and 1930 and the same Comptroller General opinion referenced by the Court of Appeals. While the Secretary cites these VA adjudications to suggest that the practice of the VA was to employ a fault-based methodology (Pet. at 14), those findings actually deal only with the causation issue. 65 Op. VA Gen Coun. 429 (1930); 50 Op. VA Gen. Coun. 439 (1928).[8] They

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[8] Claim of Frank McKeown deals with a veteran whose fingers were severed when they were slammed in a door. Claim of William Concannon deals with emergency dental care. Neither turns on the issue of fault. There is no other evidence cited by the Secretary in support of his claim that the VA actually

are entirely consistent with opinions of the Attorney General of the United States rendered in response to requests for legal advise from the Secretary, upon which the Federal Circuit relied. See 35 Op. Att'y Gen. 76 (1926); 36 Op. Att'y Gen. 61, 63 (1929); Pet. App. at 14a. Intentional departures from the statutory mandate and from the opinions of the Attorney General do not create the kind of consistent agency practice which is entitled to deference. Suffice to say, the conclusions expressed in these early proceedings hardly constitute contemporaneous evidence of a Congressional intent explicitly at odds with the plain language of Section 1151.[9]

Since the contemporaneous evidence surrounding the enactment in 1924 supports the plain language reading of Section 1151, the Secretary must rely exclusively on the argument that the 1934 reenactment implicitly adopted a fault-based analysis because that reenactment was "against the backdrop of a well-established fault-or-accident requirement" supposedly set forth in the three regulations promulgated in 1926 and 1927. (Pet. at 15-16). The Secretary's regulation cannot be saved in this case by employing the fiction that Congress is presumed to know of, and thereby to have adopted, an agency's interpretation when it re-enacts a statutory provision without change. When a regulation conflicts

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required proof of fault prior to August 1934.

[9] In the Comptroller General Opinion upon which the Secretary relies, the decision actually awarded benefits to the veteran who had developed dermatitis as a result of hospital x-rays without showing of fault. 9 Comp. Gen. 515 (1930).

with the statute, the fact of subsequent reenactment of the statute is immaterial, for Congress could not add to or expand the statute by impliedly approving the regulation. See Leary v. United States, 395 U.S. 6, 24-25 (1969), citing Commissioner v. Acker, 361 U.S. 87, 93 (1959). This Court has also noted that it is not realistic to infer approval of an administrative interpretation from Congressional silence. See United States v. Rutherford, 442 U.S. 544, 554 n.10 (1978). Reenactment is not proof of approval where there is no evidence that Congress gave any particular consideration to the Secretary's regulation during reenactment of the statute. See Rowan Cos. v. United States, 452 U.S. 247, 262 (1981); United States v. Calamaro, 354 U.S. 351, 359 (1957). Indeed, where the focus of Congress is on matters other than the agency's regulation, the failure to overturn the agency's regulation clearly falls short of supporting a construction at odds with the statute's plain meaning. See Aaron v. SEC, 446 U.S. 680, 694 n.11 (1980). As this Court has often noted, it is at best treacherous to find in Congressional silence the adoption of a controlling rule of law. See Zuber v. Allen, 396 U.S. 168, 185 n.21 (1969).

The only support for this reenactment argument the Secretary musters is isolated and cryptic comments by a single senator in 1934. (Pet. at 15). Once again, however, the Federal Circuit found that the senator's discussion "expressed the same commitment to compensation as that present in the discussion preceding the enactment of the 1924 Act." (Pet. App. at 15a).

Again, the evidence of the existence of a fault-based agency interpretation at reenactment in 1934 is no stronger than that surrounding the original enactment in 1924. Therefore, the Court of Appeals was correct not to attribute any significance to the reenactment of the statute insofar as it relates to the validity of the Secretary's regulation today.[10] Indeed, this is the same conclusion that the VA General Counsel reached in his most recent discussion of the history of Section 1151. "[T]he legislative history surrounding reenactment of this provision must be considered somewhat ambiguous." O.G.C. Precedent Opinion No. 99-90 (December 24, 1990) (C.A. App. at 109).

Congressional silence as the statute was amended four times since 1934 similarly does not justify disregarding the clear language of the statute. First, the amendments had nothing to do with the fault concept. Second, the 1962 amendment actually supports the plain meaning given the statue by the courts below. In that year, Congress removed the two-year period of limitations for Section 1151 claims and required an offset for amounts recovered by a veteran under the Federal Tort Claims Act, which is a fault-based statute. 28 U.S.C. § 1346(b). That change makes clear that Section 1151 benefits and a veteran's rights under the FTCA are compatible but not identical. The FTCA requires fault, has a circumscribed period of limitations, has a right to trial before an Article III judge, and would entitle a

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[10] The Secretary's argument that the "historical context" of the 1934 reenactment supports his view is sociological conjecture. (Pet. at 16 n.7).

veteran to compensation for pain and suffering and lost wages upon a showing of malpractice. On the other hand, Section 1151 contains none of the restrictions of the FTCA but provides a more limited range of compensation. It is not logical to conclude that where Congress carefully prescribed the terms under which it would waive the sovereign immunity of the United States under the FTCA in 1946, it previously intended to impose similar limitations on Section 1151 benefits by its silence. As the Federal Circuit observed:

> [T]here is no indication whatsoever in the legislative history or in the resulting legislative enactment that Congress intended to place on the veteran the complex and difficult burden of proving that negligence or an accident actually occurred during treatment as a condition to compensation.

(Pet. App. at 17a). Where Congress has desired to express a fault requirement as in the FTCA, that intent is made unmistakably clear.[11]

The final word on whether Congress has impliedly adopted the VA fault-based interpretation of Section 1151 also comes from an opinion of the VA's own General Counsel. In March of 1984, the General Counsel was asked whether Section 1151 benefits would be available to a veteran injured by medical treatment in a military hospital under VA auspices, as opposed to claims arising in VA medical facilities. On the issue presented the General Counsel observed as follows:

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[11] This Court has held that the existence of Section 1151 benefits does not preclude a negligence action under the FTCA. United States v. Brown, 348 U.S. 110 (1954).

Over the years, Congress has amended section 351 [current section 1151] and its predecessors but has not sought to challenge VA's interpretation by amendment or otherwise. It may, therefore, be urged that Congress has impliedly approved the requirement of VA error or fault in the current regulation. Although we would not rule out resort to this rule of statutory construction in a proper case, we do not consider it applicable here because we doubt a court would agree. Kirkhuff v. Nimmo, 683 F.2d 544 (D.C. Cir. 1982), is an excellent guide to obtaining judicial deference to our interpretations.

* * * * *

We do not believe a court would accord a similar deference to the interpretation in question here. In Kirkhuff, the statutes . . . were arguably inconsistent, necessitating resort to rules of statutory construction. That is not the case here where the interpretation is a gloss on a statute that on its face does not require VA fault. Also, in Kirkhuff, there was an unambiguous history of administrative consistency, which cannot be said of the VA decisions involving section 351 and its predecessors. We believe a court would, in the absence of affirmative congressional consent, be extremely reluctant to defer to VA's foreclosure of liability in this case.

O.G.C. Digested Opinion 212B (March 8, 1984) (emphasis supplied).

3. Because the statute is plain on its face, the Court of Appeals did not err in refusing to defer to the Secretary's asserted long-standing interpretation of the statute. In any event, no agency is entitled to deference to a history of inconsistent and ambiguous interpretations of a statute. Burnet v. Chicago Portrait Co., 285 U.S. 1, 16-17 (1932). See also EEOC v. Arabian American Oil Co., 499 U.S. 244, 257 (1991); Southeastern Community College v. Davis, 442 U.S. 377, 411-12

(1979); National Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 477 (1979); Morton v. Ruiz, 415 U.S. 199, 237 (1974). The history of the so-called "long-standing" fault-based interpretation of Section 1151 is set forth in O.G.C. Precedent Opinions 2-78 and 99-90 (C.A. App. at 105, 126), which depict an agonizing maze of ineffective efforts to define what is meant by "accident" in order to ameliorate the restrictive fault-based gloss placed on the statute by the VA. As the General Counsel conceded in his 1984 opinion cited above, the history of the VA interpretation of Section 1151 is so inconsistent it does not justify any deference by a court. O.G.C. Digested Opinion 212B.

The two VA General Counsel Precedent Opinions demonstrate that when the 1924 Act was initially applied in the field, those adjudications employed the literal language of the act. Therefore, decisions were rendered on the premise that "compensation was payable under section 213, irrespective of whether there was any fault on the part of the Bureau personnel." Memorandum of the Solicitor, October 24, 1935, at 3 (C.A. App. 109). Thereafter, however, numerous efforts were made by regulation and precedent opinion to restrict benefits to cases of "accident" or fault. All of these efforts can be traced to a single comment by General Hines in the 1924 hearings which incidentally had no bearing on the actual language of the 1924 Act:

> [I]n cases of hospitalization for compensable diseases or injuries, where without fault of the patient, as the result of accident or negligence of treatment or unskillfulness -- things that must sometimes happen -- the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof.

1924 Hearings at 113 (emphasis supplied).

While it is apparent that General Hines was using the word "accident" to denote a no-fault outcome in contrast to negligence -- as COVA observed in its decision below (Pet. App. at 28a) -- the subsequent interpretations given the term "accident" by the VA attempt to identify a category of cases somewhere between no-fault and negligence. Regulations Nos. 137, 157, and 167 are themselves examples of failed attempts to define this notion. Indeed, in O.G.C. Precedent Opinion 99-90, the General Counsel acknowledged that the reference to "accident" by the Comptroller General decision reported at 9 Comp. Gen. 515 (1930), which drove these definitional efforts, was actually "gratuitous and largely irrelevant obiter dictum." (C.A. App. at 111). That interpretation nevertheless was carried over in Administrator's Decision No. 255 (August 9, 1934), which first concluded that benefits were payable only when the injury arose through accident, carelessness, or negligence. Id.

This view was altered yet again in July of 1953 when the VA Solicitor explained that benefits were payable only if injury was caused by "accidental means." (C.A. App. at 112). There is no explanation in the 1990 Precedent Opinion as to what this modification meant in the context of Section 1151 benefits. The

regulation was modified yet again in 1961. In the 1978 Precedent Opinion, the General Counsel concluded that the 1961 regulation accepted the "ordinary meaning of the word 'accident' [as] opposite that of 'negligence.'" (C.A. App. 112). It is again not clear that the 1961 regulation, however, was meant to provide compensation in no-fault circumstances as "opposite that of negligence." In the 1978 amendment to the regulation, generated by the General Counsel's expressed dissatisfaction with the 1961 interpretation, the concept of "accident" as opposite "negligence" was translated into a new definition of "accident" as "any unforeseen, untoward result." (C.A. App. at 130); 43 Fed. Reg. 51015 (November 2, 1978). Yet in 1990, the General Counsel concluded that even that definition did not "allow grants of benefits in certain cases we believe fall reasonably within the realm contemplated by Congress when creating this benefit." O.G.C. Prec. Op. 99-90 (C.A. App. at 113). Believing that even the 1978 definition -- the current provision involved in this case -- "is too restrictive in view of the legislative history" of Section 1151, the Secretary has proposed yet another regulation re-defining the notion of "accident" to prevent unfair results in adjudicating Section 1151 benefit claims. That new regulation has not been adopted. However, the terms of that regulation were included in the failed legislative amendment

proposed by the Secretary in response to the decision of COVA in this case. See S. 2383, 102d Cong., 2d Sess. (1992).[12]

Therefore, rather than demonstrating a long-standing agency interpretation of a statute, VA history reveals no less than eleven different definitions or interpretations of the word "accident" even though that word appears nowhere in the statute. The VA does not even believe that the regulation as it exists today accurately reflects Congressional intent. The problem is aptly summarized by the General Counsel himself in the 1978 Precedent Opinion: "Some of the difficulty seems to have resulted from the fact that administrative officials have not construed the language of the statute literally in determining whether benefits were payable. . . ." O.G.C. Prec. Op. 2-78 at 3 (C.A. App. at 128).

4. This Court should not review the Federal Circuit's eminently reasonable conclusion that regulations of the VA should be subject to "vigorous review." (Pet. App. at 20a).

As the Federal Circuit recognized, Section 1151 benefits constitute a potential "statutory right" conferred by Congress. (Pet. App. at 21a). The Secretary may not regulate away those rights by using his limited authority to enact regulations under 38 U.S.C. § 501. That authority does not include the right to

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[12] It is interesting to note that in support of that legislative amendment to Section 1151, the Secretary opined that the decision in this case would cost $5 billion in the next five years. 138 Cong. Rec. S4040 (daily ed., March 20, 1992). Now before this Court that figure is down to $1 billion. (Pet. at 19).

enact substantive regulations affecting individual rights in a manner which is at odds with the administrative structure Congress has enacted into law. See ETSI Pipeline Project v. Missouri, 484 U.S. 495, 517 (1988). This Court has made clear that VA regulations which are inconsistent with Congressional statutes constitute impermissible legislation. Miller v. United States, 294 U.S. at 439-440. Where Congress intends to permit such substantive rule-making by the VA, it specifically so provides. See, e.g., Veterans Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984).

There is no reason to require a less restrictive review of such regulations than that enunciated by the Federal Circuit. The very reason for the creation of the Court of Veterans Appeals was the history of ineffective and unfair VA adjudication of veterans' benefits. As Senator Cranston stated in support of creation of the Court of Veterans Appeals:

> [A]nother basic reason for judicial review legislation is the need to establish a basis for review of questionable agency actions restricting, withholding, or withdrawing VA benefits. . . . There is also the potential for unduly restrictive legal opinions from the Office of the General Counsel which may operate to deny veterans access to benefits to which they are entitled under the law.
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> * * * * *
>
> I am suggesting that outside review by an independent entity to determine whether governmental action is legal and whether it is fundamentally fair would benefit all parties involved. The VA would have its processes subjected to appropriate scrutiny

> and, to the extent the agency's actions were upheld, would be vindicated. Likewise, to the extent the agency's actions were held unlawful or fundamentally unfair, steps could be taken to improve the process so as to ensure that the agency is fulfilling its mission to serve veterans in the best possible fashion.

134 Cong. Rec. 31465 (October 18, 1988).

This vigorous review is also shown to be justified by the jurisprudence of the Court of Veterans Appeals in the six years of its life. COVA has repeatedly criticized the VA for its misinterpretation of Congressional statutes and for VA's intransigence and reluctance to conform its practices to the realities of judicial review. For example, in Jones v. Derwinski, 1 Vet. App. 596 (1990), the VA had to be enjoined from directly contacting represented veterans and from providing to veterans outdated and erroneous information. The Secretary was also sanctioned for not promptly correcting an inaccurate representation made to the court upon discovery of that inaccuracy. In Fugere v. Derwinski, 1 Vet. App. 103 (1990), aff'd 972 F.2d 331 (Fed. Cir. 1992), COVA held that the VA could not rescind a protective directive from its adjudication manual without public notice and comment. In Tobler v. Derwinski, 2 Vet. App. 8 (1991), COVA was obligated to direct the VA to apply the decisions of the court as precedent in adjudicating claims at the regional offices and before the BVA. In Hines v. Derwinski, 2 Vet. App. 30 (1991), COVA issued a show cause order as to why costs should not be granted against the VA for failing to respond to a veteran's record request for over six years. In Adamski v.

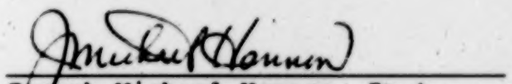
Derwinski, 2 Vet. App. 46 (1991), COVA sanctioned the VA for dilatory tactics in failing to file the record on appeal when ordered. In Moore v. Derwinski, 2 Vet. App. 67 (1992), COVA ordered the Secretary to show cause why he should not be subject to contempt for failing to pay benefits as ordered by the court. In King v. Brown, 4 Vet. App. 519 (1993), COVA complained of the VA failure to provide an accurate and relevant record and basis for decisions on appeal.

These and numerous other decisions make clear that judicial review of VA's regulations and adjudicatory practices was sorely needed. As the Federal Circuit noted, Congress's lengthy deliberation over the Veterans' Judicial Review Act, and its carefully crafted scheme for judicial review of VA regulations, counsels for "vigorous review." There is nothing about that language which contravenes precedent of this Court or prohibits deference to the Secretary where appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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No. 93-1128

In the Supreme Court of the United States

OCTOBER TERM, 1993

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
PETITIONER

v.

FRED P. GARDNER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Several points raised in respondent's opposition to our petition for certiorari call for a brief reply.

1. Respondent's assertion (Br. in Opp. 11) that the Secretary imposes a fault requirement on only one out of four categories of claims under Section 1151 is incorrect. The phrase "approved medical or surgical care properly administered" in 38 C.F.R. 3.358(c)(3) encompasses cases arising out of hospitalization or medical examination as well as those arising out of medical or surgical treatment *per se*, and the Secretary has interpreted and applied the statute and the

regulation to require a showing of fault or accident in such cases.[1]

2. The parallel that respondent attempts to draw (Br. in Opp. 12-15) between compensation for service-connected and non-service-connected disabilities is flawed. The basic premise of compensation for service-connected disabilities under 38 U.S.C. 1110 and 1131 (Supp. IV 1992) is that the government will assume responsibility for conditions contracted by service members "in the line of duty." In defining what constitutes the "line of duty," Congress has generally required only a temporal relationship between the service member's duty status and the onset of the condition. See 38 U.S.C. 105 (1988 & Supp. IV 1992). Section 1151, by contrast, provides for the payment of compensation for certain disabilities *as though* they arose from service-connected conditions. That compensation is not based on a general assumption of responsibility by the government toward those who take up arms on its behalf; rather, it is based on specific causal connections between the disability in question and treatment rendered by the Veterans Administration with respect to some condition that had nothing to do with the veteran's military service. It would be quite odd to treat these two situations alike. Congress could, instead, quite rationally have intended to require some showing of

[1] See, *e.g.*, *Cariaga* v. *Brown*, 5 Vet. App. 397 (1993) (death during hospitalization); VA Admin. Dec. 944 (July 26, 1954); VA Admin. Dec. 992 (Dec. 14, 1970); 2 Op. Sol. VA 260 (1931) (injury during travel to examination not covered because no VA fault involved); compare 38 C.F.R. 3.358(c)(4) (injury during transportation associated with hospitalization); 38 C.F.R. 3.358(c)(7) (special provisions for nursing home care).

causation and fault before assuming full governmental responsibility for disabilities arising from the treatment of non-service-connected conditions.[2]

2. In response to our argument based on long congressional acquiescence in the Secretary's interpretation of Section 1151, respondent quotes at length (Br. in Opp. 25-26) from a General Counsel opinion of March 8, 1984. That opinion—which we have reprinted for the Court's convenience as an appendix to this brief—deals with a case in which a veteran claiming compensable injury under Section 1151 was treated, not at a facility operated by the Department of Veterans Affairs (VA), but at a military hospital operated by the Department of Defense (DOD). The General Counsel rejected as "overly restrictive" any reading of 38 C.F.R. 3.358(c)(3) that would have precluded liability because the treatment was rendered in a DOD, rather than a VA, hospital. Rather

[2] Respondent contends (Br. in Opp. 15, emphasis omitted) that petitioner's "own General Counsel [has] stated that Congress did not intend there to be a distinction between recipients" of benefits under Sections 1110, 1131 and 1151. But respondent cites General Counsel Opinion 80-90 completely out of context. That opinion dealt with the question whether survivors of a veteran who had been receiving benefits under Section 1151 before his death were entitled to receive death benefits under what is now 38 U.S.C. 1318 (Supp. IV 1992), which provides death benefits under certain circumstances where at the time of death the veteran was entitled to compensation "for a service-connected disability." Op. VA Gen. Coun. 80-90 (1990). The General Counsel concluded (*id.* at 3) that once a veteran is awarded benefits under Section 1151, Congress intended that his disability should be treated as "service-connected" for purposes of Section 1318 as well. That conclusion is irrelevant to the question at issue in this case.

than supporting respondent's position, the opinion accepts as a premise that Section 1151 requires some governmental fault as a predicate for the award of benefits. App., *infra*, 2a, 5a.

Conversely, respondent fails in his attempt (Br. in Opp. 21-22) to distinguish the two early administrative decisions (*Concannon* and *McKeown*, cited at page 14 of the petition) that demonstrate that the VA applied a fault requirement under the predecessor to Section 1151 before repeal and reenactment of the provision in the early 1930's. The opinion on the Concannon claim, 65 Op. VA Gen. Coun. 429 (1930), determined that the veteran's emergency dental treatment had been properly authorized, so that he would be eligible for *consideration* for compensation under Section 1151 (then Section 213) if he met the other requirements of that Section. 65 Op. VA Gen. Coun. at 431. The opinion states unequivocally that those other requirements include a showing that "the disability causing the death proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, etc., in furnishing the treatment, as distinguished from the usual after results of approved medical care and treatment properly administered." *Ibid.* Similarly, the opinion on the McKeown claim, 50 Op. VA Gen. Coun. 439 (1928), rests on the conclusion that "[i]t is apparent from the facts in this case that this veteran, by reason of his hospitalization, was unnecessarily placed in a position of peculiar danger and allowed to remain there, evidently through the *fault* of authorities in charge of the hospital." *Id.* at 440 (emphasis added).

Finally, respondent suggests (Br. in Opp. 22 n.9) that the 1930 opinion of the Comptroller General cited in the petition (at 14) indicates that a veteran who developed dermatitis as the result of x-rays was accorded benefits without a showing of fault. The opinion in question concludes that the VA was not required to discontinue compensation previously awarded to a veteran when it later determined that the veteran's original VA hospitalization—out of which the dermatitis arose—should not have been authorized. See 9 Comp. Gen. 515, 516-517 (1930). The opinion explicitly notes that "[t]he plain intent of [what is now Section 1151] * * * was to afford veterans some measure of compensation in those cases in which the disability arises through accident, carelessness, negligence, lack of proper skill, error in judgment, etc." 9 Comp. Gen. at 516. The opinion thus makes perfectly clear that the applicable legal standard required some showing of fault.[3]

4. There is no question that the Court of Appeals for the Federal Circuit can and should subject the Secretary's regulations to thorough review. See Br. in Opp. 30-33. There should also, however, be no question that such review must be subject to the

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[3] Respondent also points to the fact that there have been changes over the years in the details of the VA's implementation of the causation requirements under Section 1151, particularly with respect to compensation in cases involving "accident" rather than fault. See Br. in Opp. 28-30. The details of the Secretary's interpretation of the fault and accident requirements are not, however, at issue in this case. The question is whether the Secretary has permissibly construed Section 1151 to impose *some* requirement of fault or "accident."

same principles of deference to reasonable and long-standing administrative interpretations that guide and limit judicial review of the regulations of all other administrative agencies. See Pet. 19-20. Indeed, observance of those principles is particularly necessary in the case of the VA. Because the Federal Circuit has exclusive jurisdiction to review challenges to the Secretary's regulations, a single lower court decision like the one in this case can, without this Court's review, sweep aside 60 years of administrative precedent and practice, direct the payment of hundreds of millions of dollars in unwarranted benefits,[4] and require corrective action from a Congress that has never, despite repeated attention to the relevant statutory provisions, expressed disagreement with the Secretary's interpretation.

* * * * *

For the foregoing reasons and those previously stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MARCH 1994

[4] Respondent notes (Br. in Opp. 30 n.12) that the cost estimate contained in the petition (at 19) seems conservative in comparison to others previously provided to Congress. The $1 billion figure included in the petition is based on a conservative reading of the court of appeals' holding in this case. We believe that reading to be the correct one. If, however, the decision were to be read more expansively by later cases, the cost of implementing it would obviously be higher.

APPENDIX

Department of Veterans Affairs
Office of the General Counsel
Digested Opinion

March 8, 1994

HELD: No bar exists to consideration of a claim based on 38 U.S.C. § 351 arising from alleged injury to a veteran in a military hospital under VA auspices, even though there is no showing of fault on the part of VA employees.

Request for opinion concerning a section 351 claim based on military-hospital surgical treatment

1. You requested our opinion as to whether hospitalization or medical or surgical treatment furnished under VA auspices to a VA beneficiary in a military hospital lays the predicate for a claim under section 351 of title 38, United States Code. That section authorizes compensation to any veteran disabled by reason of an injury or aggravation of an injury suffered 'as a result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Veterans Administration . . . and not the result of the veteran's own willful misconduct . . .' For reasons set forth below, our answer is in the affirmative.

2. In this case the veteran, whose service connected disabilities were rated non-compensable, was awarded [a] VA pension effective January 6, 1981. A resident of El Paso, Texas in 1980-81, he was admitted to the William Beaumont Army Medical Center in El Paso on January 12, 1981, and surgery was performed on January 26 for a nonservice connected condition.

Through an ongoing agreement with the Department of Defense that applies to many military hospitals besides Beaumont, VA leases a number of beds in the Beaumont facility and in this way secures needed care for eligible veterans. The veteran's records do not document authorization for his admission, but, according to the Army Medical Center, VA paid for his care. The veteran now claims compensation benefits under section 351, alleging the surgery resulted in additional disability. The merits of this allegation are not at issue in this opinion, which conerns only whether injury resulting from treatment at such a facility can give rise to eligibility under section 351.

3. Neither section 351 itself nor its implementing regulation, section 3.358 of title 38, Code of Federal Regulations, which governs determinations of disability for section 351 purposes, excludes section 351 eligibility based on VA-authorized military hospitalization. However, subsection (c)(3) of that section rules out compensation for events occurring during hospitalization in the absence of a showing of 'indicated fault on the part of the Veterans Administration.' Events occurring in a military hospital and giving rise to a section 351 claim ordinarily would not involve 'indicated fault' by VA employees. In this case, for example, the veteran does not allege misfeasance by VA employees.

4. In our view, the interpretation in 38 C.F.R. § 3.358(c)([3]) is overly restrictive. It must be remembered that section 616 of title 38 specifically authorizes the VA to reimburse other Federal agencies, including the military, for care provided to veterans. We observe that Congress recently expanded VA's capacity to utilize military-hospital facilities for veterans' care; see, *e.g.*, 38 U.S.C. §§ 5011 and 5023.

We suggest, therefore, that the requirement of 'indicated fault on the part of the Veterans Administration' should not apply if the claim is founded on allegations of injury during VA-authorized military hospitalization.

5. The congressional debates at the time section 351's predecessor statute was reenacted following the Economy Act, Pub. L. No. 73-2 (1933), dwell on the Federal Government's responsibility to compensate veterans treated under VA auspices for Government malpractice. The debates do not evince an intent to preclude consideration of claims based on VA-authorized care in a military hospital, 78 Cong. Rec. 3289-3290 (1934). Interestingly, two of the very first cases occasioning interpretation of section 351's predecessor statute involved hospitals not under the direct jurisdiction of the Veterans Bureau or the Veterans Administration. In a Comptroller General decision dated June 18, 1930 (A-31895, 9 Comp. Gen. 515), the veteran had been hospitalized during the later 1920's in the Pacific Branch of the National Home for Disabled Volunteer Soldiers. The National Homes were administratively separate from the Veterans Bureau and not consoldiated until the VA's inception in 1930. See, *e.g.*, Medical Care of Veterans 61-76 (Veterans Administration, 1967). The Comptroller General was of the view that Congress intended coverage for the 'acts of any person charged with duty respecting [veterans'] care,' and 'all classes of Governmental hospitalization.' In the other case, dealt with in Administrator's Decision No. 255, August 9, 1934, the veteran had been hospitalized in the Norfolk Naval Hospital. (That decision, which determined the veteran ineligible because the claim was not founded on malpractice, would appear to have

been superseded by Op. G.C. 2-78 under which an accident may be the basis for a section 351 claim.)

6. Over the years, Congress has amended section 351 and its predecessors but has not sought to challenge VA's interpretation by amendment or otherwise. It may, therefore, be urged that Congress has impliedly approved the requirement of VA error or fault in the current regulation. Although we would not rule out resort to this 'rule of statutory construction' in a proper case, we do not consider it applicable here because we doubt a court would agree. *Kirkhuff* v. *Nimmo*, 683 F.2d 544 (D.C. Cir. 1982), is an excellent guide to obtaining judicial deference to our interpretations. In that case, plaintiff sought to overturn VA's rule making veterans with routine pregnancy ineligible for nonservice-connected health care. In support of its deference to the VA's interpretation, the court cited contemporaneous (1924) legislative history, VA's wide-ranging discretion in veterans' benefits matters, and VA's longstanding and consistent adherence to its rule, *id.* at 552.

7. We do not believe a court would accord a similar deference to the interpretation in question here. In *Kirkhuff*, the statutes (38 U.S.C. §§ 610(a)(1)(B) and 601(1)) were arguably inconsistent, necessitating resort to rules of statutory construction. That is not the case here where the interpretation is a gloss on a statute that on its face does not require VA fault. Also, in *Kirkhuff*, there was an unambiguous history of administrative consistency, which cannot be said of the VA decisions involving section 351 and its predecessors. We believe a court would, in the absence of affirmative congressional consent, be extremely reluctant to defer to VA's foreclosure of liability in this case.

8. We conclude, therefore, that no bar exists to the consideration of this veteran's section 351 claim, but caution once again that the claim's merits remain to be determined by the adjudicating authority. As is made clear in 38 C.F.R. § 3.358 and Op. G.C. 2-78, section 351 compensation is not insurance against all disability that follows hospitalization or medical or surgical treatment under VA auspices. Rather, this is a special benefit afforded to those suffering from untoward consequences of the hospitalization or treatment. We observe also that section 351 requires offset of funds received by reason of a Federal Tort Claims Act action, an offset that applies whether the FTCA action is against the military or against the VA. In the case of pension veterans awarded section 351 compensation, moreover, section 523 of title 38 applies so that the veteran may receive only the greater benefit.

Supreme Court, U.S.
FILED
MAY 19 1994
OFFICE OF THE CLERK

No. 93-1128

In the Supreme Court of the United States

OCTOBER TERM, 1993

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
PETITIONER

v.

FRED P. GARDNER

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JANUARY 11, 1994
CERTIORARI GRANTED APRIL 4, 1994

45 pp

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Docket No. 92-7025

FRED P. GARDNER, CLAIMANT-APPELLEE

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS, RESPONDENT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS AND ORDERS
March 9, 1992	Notice of appel [*sic*] filed by Appellee in the US CVA. (lp)
March 11, 1992	Notice of appeal and certified list, received. (lp)
•	• • • • •
March 13, 1992	Notice of appeal and certified list, docketed. Notice sent to the parties. (lp)
•	• • • • •
June 2, 1992	BRIEF FOR APPELLANT, filed. (MS-6/2) (sp)
June 9, 1992	Corrected brief for appellant, rec'd. (MS-6/9) (sp)
•	• • • • •
August 25, 1992	BRIEF FOR APPELLEE, filed. (MS-8/24) (sp)
•	• • • • •

DATE	PROCEEDINGS AND ORDERS
September 10, 1992	REPLY BRIEF FOR APPELLANT, filed. (MS-9/10) (sp)
September 15, 1992	JOINT APPENDIX, filed. (MS-9/15) (sp)
September 24, 1992	Corrected reply brief for appellant, rec'd. (MS-9/23) (sp)
* * * * *	
November 9, 1992	ARGUED. (Archer, Michel and Lourie, JJ) (as)
* * * * *	
September 13, 1993	12. *AFFIRMED.* (ARCHER, J) "JUDGMENT ENTERED" (sk). 5 F3d 1456
October 4, 1993	*ISSUED AS A MANDATE* TO THE COVA. (lp).
* * * * *	
	13. PETITION FOR WRIT OF CERTIORARI FILED 01/11/94, SUPREME COURT #: 93-1128. (EOO 01/26/94 BY JA) 92-7025
	14. PETITION FOR WRIT OF CERTIORARI FILED 01/11/94, SUPREME COURT #: 93-1128. CERT. GRANTED ON 04/04/94. U.S.L.W.: 62-3657 (EOO 04/14/94 BY JA) 92-7025

UNITED STATES COURT OF VETERANS APPEALS

Docket No. 90-120

FRED P. GARDNER, APPELLANT

v.

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, APPELLEE

RELEVANT DOCKET ENTRIES

Date	Filings and Proceedings
02-20-90	Notice of appeal (m-22) (ad)
* * * * *	
03-07-90	Statement of issues (m-15) (mlr)
* * * * *	
07-23-90	Record (m-23) (ad)
* * * * *	
08-02-90	Appellant's brief (m-3) (ad)
* * * * *	
09-26-90	Appellee's brief (m-26) (ad)
10/3/90	SCREENED (mlr)
11/02/90	Order, sua sponte, that this appeal is submitted to a panel comprised of Chief Judge Nebeker, and Assoc. Judges Holdaway and Ivers for decision w/o oral argument (RFC) (ad)

Date	Filings and Proceedings
11/6/90	Order, sua sponte, that appellee file a supple memo by 11/26/90, addressing specific issues; appellant may respond to appellee's supple memo within 20 days after the date of service (Nebeker) (mlr)
	* * * * *
02-05-91	Per Curiam ORD, Sec's Motions of 11/29/90 & 12/26/90 for enlargement of time are moot; fur ord Sec's MO of 1/25/91 for enlargement of time is granted; Sec shall file Memo on or before 2/24/91 (NEBEKER, HOLDAWAY & IVERS) (amc)
02/25/91	Appellee's response to order of the Court to file supple memorandum (m-25) (ad)
03/14/91	Appellant's response to supple memorandum (m-15) (ad)
03/15/91	Per Curiam order, sua sponte, that the Clerk shall inform interested Veteran Service Organizations that, if any a desire to submit their views on the foregoing issue by 3/25/91 (NEBEKER, HOLDAWAY, IVERS) (ad)
3/15/91	Notice to Veterans Organizations in regard to memorandum on an issue before the Court (RFC) (ad)
03/15/91	Per Curiam Ord, sua sponte, that J. Michael Hannon, Esquire, a member of the Bar of District of Columbia, is appointed to file a br as amicus curiae. The brief is due 4-24-91, amicus is requested to present oral argument when the case is scheduled for hearing (NEBEKER, HOLDAWAY, IVERS) (ad)
	* * * * *
6-3-91	Amicus Curiae Brief (m-3) (aw)
	* * * * *
08-07-91	Argued before Chief Judge NEBEKER and A.J.'s HOLDAWAY and IVERS (sae)

Date	Filings and Proceedings
11-25-91	Opinion reversing BVA decision and the matter is remanded for further proceedings (NEBEKER, HOLDAWAY, IVERS) (vm)
	* * * * *
12-09-91	Appellee's MO for Reconsideration or, in the Alternative, for Review en Banc (m-9) (emb)
01-10-92	Per Curiam ord that the Mo for reconsideration is denied; fur ord by the Court en banc that the Mo for review en banc is denied, no judge having called for a vote on the Mo (NEBEKER, KRAMER, FARLEY, MANKIN, HOLDAWAY, IVERS, AND STEINBERG) (vm)
01-13-92	Judgment is hereby entered on 01/10/91 (vm)
03-09-92	Appellee's Notice of Appeal to the U.S.C.A. for the Federal Circuit (m-9) (vm)
03-10-92	Appellee's Notice of Appeal transmitted to the Clerk of the U.S.C.A. for the Federal Circuit (vm)

OPINION OF THE COMPTROLLER GENERAL

(dated June 18, 1930)

[9 Comp. Gen. 515]

(A-31895)

VETERANS' BUREAU—
DISABILITY COMPENSATION

Under section 213 of the World War veterans' act, as amended by the act of March 4, 1925, 43 Stat. 1308, a beneficiary of the Veterans' Bureau who suffers an injury or aggravation of an existing injury as the result of hospitalization furnished by the bureau, may be awarded compensation, if disability is of a compensable degree, even though the disability for which the hospitalization was furnished is later determined not to have been service connected, provided claim is made within two years after the injury or aggravation as a result of hospitalization was suffered.

Comptroller General McCarl to the Director, United States Veterans' Bureau, June 18, 1930:

Consideration has been given to your letter of May 15, 1930, submitting for decision a question presented as follows:

> I have the honor to solicit your decisions on the case of Leon Silver, XC-310SS5, which is now pending in the bureau for adjudication. The facts in this case may be stated as follows:
>
> Leon Silver was called into the service on September 21, 1917, under the selective service act and was discharged "from the draft" on October

13, 1917 by reason of disability. On November 4, 1919 Mr. Silver executed an application for disability compensation alleging a disability of "tuberculosis and chronic ear." Several ratings were made by the bureau holding that the claimant's disability had not been incurred in or aggravated during the period of his service as a draftee, but subsequently the bureau held that an aggravation had taken place during the period of draft service, and the tubercular disability was rated as service connected. The rating of service connection was continued until September, 1920, when after a careful review of the complete file it was held that the disability was not shown to have been incurred in or aggravated by service and service connection was severed.

On January 17, 1924, at which time the disability was rated as service connected, the claimant was hospitalized in the Pacific Branch of the National Home for Disabled Volunteer Soldiers, Los Angeles, Calif., as a bureau patient. He remained in this hospital as a bureau patient until April 17, 1928, when he was discharged against medical advice. While a patient in this hospital the veteran was given X-ray treatments and as a result thereof a disability of dermatitis with ulcerations was incurred.

The question which arises in this case is whether the disability of dermatitis with ulcerations resulting from X-ray treatments can be held to be service connected under the provisions of section 213 of the World War veterans' act, which reads as follows:

"Where any beneficiary suffers or has suffered an injury or an aggravation of an existing

injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him under the vocational rehabilitation act as amended, the war risk insurance act as amended, or this act, or as a result of having submitted to examination under authority of section 303 of the war risk insurance act or section 203 of this act, and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title shall be awarded in the same manner as though such disability, aggravation, or death was the result of military service during the World War. The benefits of this section shall be in lieu of the benefits under the act entitled 'An act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,' approved September 7, 1916: *Provided*, That application be made for such benefits within two years after such injury or aggravation was suffered or such death occurred or after the passage of this act, whichever is the later date: *Provided further*, That the provisions of section 313 of the war risk insurance act as amended, relating to subrogation, shall be applicable to beneficiaries under this section."

The plain intent of section 213 of the statute, amended, as above quoted, by the act of March 4, 1925, 43 Statute 1308, was to afford veterans some measure of compensation in those cases in which the disability arises through accident, carelessness, negli-

gence, lack of proper skill, error in judgment, etc., on the part of any person charged with a duty respecting the hospitalization, or medical or surgical treatment pursuant to an award under either of the acts therein mentioned. That said section was intended to be applicable to all classes of governmental hospitalization authorized under the statute, whether for service-connected or nonservice-connected disabilities, is evident from the specific inclusion of veterans hospitalized under authority of section 203 of the statute which provides for hospitalization, for purposes of observation and examination, of applicants for disability compensation and applicants for treatment under subdivisions (9) and (10) of section 202 of the statute, the latter of which authorizes hospitalization for nonservice-connected disabilities.

In this case hospitalization was authorized as incident to disability compensation then running and which had been awarded pursuant to the terms of the statute as for a disability then recorded as service connected. Hospitalization as incident to receipt of compensation is a right of the beneficiary under the terms of section 202 (6) of the statute. A subsequent finding by the bureau upon review under section 205, that the disability for which compensation had previously been awarded and incident to which the hospitalization had been granted, was not service connected, necessitating discontinuance of compensation, is not "effective until the first day of the third calendar month next succeeding in which such * * * discontinuance is determined." Consequently, such a review and finding of nonservice connection would not invalidate the hospitalization granted during the period the award of compensation had been running; nor is an award of compensation

under section 213 for an injury or aggravation of an existing injury, as a result of such hospitalization, invalidated by the review and finding of non-service connection. Also, an application for disability compensation based on the provisions of section 213 may be entertained even if filed after the disability compensation as an incident of which the hospitalization was furnished may be terminated as a result of review and rerating, if "made * * * within two years" after the injury or aggravation as a result of hospitalization was suffered.

In this case compensation for the disability of "dermatitis with ulcerations resulting from X-ray treatments" may be awarded if of compensable degree the same as though the former disability had been service connected and the discontinuance of compensation therefor had been due to a complete recovery from said disability.

The facts as to the filing of application under section 213 do not clearly appear, and it is to be understood, of course, that unless the application was actually made within two years after the disability from the X-ray treatments was suffered, the benefits provided for under said section may not be granted.

VA GENERAL COUNSEL'S OPINION NO. 2-78

December 15, 1977 (Opinion Date)

October 25, 1978 (Publication Date)

Subject: APPLICATION OF THE TERM "ACCIDENT" AS USED IN VAR 1358(C)(3)

QUESTIONS PRESENTED:

1. Does the word "accident" include surgical accident, that is, unexpected surgical results as opposed to contemplated risks?

2. Is it unnecessary to first find negligence when an accident is found?

3. Is the VA in the position of guarantor of the unexpected results of surgery but not foreseeable risks?

COMMENTS:

This veteran was in a VA hospital for gradual onset of weakness in the left lower extremity. An impression was made of partial transverse myelitis possibly due to surgical intervention, spinal cord tumor, epidural abscess, vascular accident, or multiple sclerosis. Exploratory surgery was performed in February 1954. Following this, there was evidence of increased symptomatology and the surgical wound had to be reopened for the evacuation of a hematoma. The veteran was discharged from the hospital in September 1954 at which time the veteran was able to get about with the assistance of a cane and in a wheelchair.

Based upon an opinion by the Chief Medical Director that the veteran had increased symptomatology

following the surgery, the Director of the Compensation, Pension and Education Service, by administrative review, dated June 12, 1967, held that the injury was the result of a "surgical accident" under VA Regulation 1358(C)(3) and not due to negligence. The case is presently before the Board of Veterans Appeals on a question of retroactive benefits.

The statute applicable to this case, 38 U.S.C. 351, states, in part, as follows:

> "Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment . . . and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter [chapter 11] and dependency and indemnity compensation under chapter 13 of this title [title 38, United States Code] shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. . . ."

A provision similar to the currently existing section 351, supra, was first enacted as section 213, Public No. 242, 68th Congress, the World War Veterans' Act, 1924, as amended (43 Stat. 607). Section 213, supra, was originally enacted on the recommendation of the Veterans' Bureau, the precursor of the Veterans Administration. In testimony before the Committee on World War Veterans' Legislation, House of Representatives, which was considering the bill subsequently enacted as the World War Veterans' Act of 1924, the then Director of the Veterans' Bureau stated, on February 26, 1924, in part, as follows

with respect to the recommendation which later became section 213, supra:

> "This is a new principle but one necessary to the very purpose for which the benefits of these acts are accorded. * * *
>
> ". . . in cases of hospitalization for compensable diseases or injuries, where without fault of the patient, as the result of accident or negligence of treatment or unskillfulness—things that must sometimes happen—the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof. The Government having undertaken to bestow a benefit has, in fact, inflicted a loss.
>
> "It is therefore proposed, with proper restrictions safeguarding against double payments of compensation, to authorize in such cases an increase in compensation commensurate with the increased disability." (Page 113, Hearings before the Committee on World War Veterans' Legislation, House of Representatives, 68th Congress, 1st session.)

The 1924 Act was repealed by section 17 of Public 2, 73d Congress, March 20, 1933, 48 Stat. 11, the so-called Economy Act. Thereafter, on March 28, 1934, section 31 of Public Law 73-141 (48 Stat. 526) was enacted, substantially reenacting the original provisions of the law as it existed prior to the Economy Act. Senator Steiwer, who offered the amendment to include such provision, in section 31, supra, in stating the purpose of that section testified as follows:

> "* * * Where a veteran is injured because of malpractice, he shall receive compensation just

the same as though his disability were of war-service origin."

and that

"* * * where, in a veterans' hospital, a veteran is disabled by reason of mistreatment on the part of a Government agent, as in a case of malpractice by a Government surgeon, that disability shall be treated just the same as a war disability . . . ." (Congressional Record, Vol. 78, part 3, page 3289.)

The regulation currently implementing 38 U.S.C. 351 is VAR 1358(C)(3), 38 C.F.R. 3.358(c)(3), which provides:

"Compensation is not payable for either the usual or the unusual after results of approved medical care properly administered, in the absence of a showing that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Veterans Administration."

In Administrator's Decision No. 255 (August 9, 1934), it was determined that by enacting section 31 of Public Law 73-141, Congress apparently intended to reenact the prior existing law (section 213 of the World War Veterans' Act of 1924, as amended). "Accordingly," it was stated in that decision, "the instructions and precedents governing the determination of entitlement to benefits under section 213 of the World War Veterans' Act, as amended, are applicable in determining entitlement to benefits under section 31 of Public No. 141." In that decision it was noted that the Comptroller General of the United

States, in a prior decision rendered on June 18, 1930 (A-31895, 9 Comp. Gen. 515), held that "the plain intent of section 213 of the World War Veterans' Act, 1924, as amended, was to afford veterans some measure of compensation in those cases in which the disability arises through '*accident*, carelessness, negligence, lack of proper skill, error in judgment, etc., on the part of any person charged with a duty respecting the hospitalization, or medical or surgical treatment pursuant to an award under either of the acts therein mentioned.'" (Emphasis supplied.) The Administrator then held as follows in his August 9, 1934, decision:

"In line with the decision rendered by the Comptroller General on June 18, 1930, and the statements made at the time Public No. 141 was being considered by the Senate as to the purpose of section 31, monetary benefits are not payable as the result of the veteran's death unless it is shown that the death proximately resulted from *accident*, carelessness, negligence, lack of proper skill, error in judgment, *malpractice*, *etc.*, on the part of the person, or persons, charged with a duty respecting his hospitalization or treatment." (Emphases ours.)

As can be seen, the Administrator added the word "malpractice" to the prior construction of section 31, supra. The addition of that word is not deemed to be significant for the purpose of the present discussion since the word "malpractice" is virtually synonymous with "negligence" in this context, and it is noted that the use of the term "accident" was continued.

By memorandum of October 24, 1935, the then Solicitor of the Veterans Administration reviewed for

the Administrator of Veterans Affairs the instructions and precedent decisions issued under and interpreting the provisions of section 31, Public No. 141, 73d Congress. In that memorandum the Solicitor indicated that the original field office adjudications under 213 of the 1924 Act, awarded compensation for additional disability resulting from training, hospitalization, or medical or surgical treatment other than through the veteran's own misconduct, *irrespective of any fault on the part of Veterans' Bureau personnel.* However, it was reported that in 1926 the first regulations relative to compensation awards under section 213, supra, were promulgated. One such regulation was V.B. Regulation No. 157 which authorized the payment of compensation if an additional disease or injury resulted from examination or treatment where there was satisfactory evidence of "malpractice, malfeasance, or misfeasance on the part of the U.S. Veterans' Bureau." The Solicitor reported that that regulation was subsequently challenged as being more restrictive than the law upon which it was predicated, and, thereafter, it was amended with the approval of the General Counsel of the Veterans Administration. The reference to malpractice, malfeasance or misfeasance on the part of Bureau personnel was deleted from the regulations implementing section 213. Following a recounting of the above, the Solicitor then considered the proper construction to be placed on the new regulation R&P, R-1121(B)(4) which read:

> "The usual after results of approved medical care and treatment properly administered will not be held as entitling to payment of compensation under section 213 of the Act."

His opinion as to the proper construction thereof was basically a restatement of the holding in A.D. No. 255 and former conclusions: that neither the usual nor unusual after results of approved medical care and treatment properly administered would be held as entitling payment of compensation under section 213, supra, in the absence of a showing that the disability proximately resulted from accident, carelessness, negligence, etc., on the part of any person or persons charged with a duty respecting hospitalization or treatment of the veteran. In addition, the Solicitor further stated that *the law did not require the claimant to go so far as to show malpractice,* but that it was necessary that there be more than a mere showing that the disability resulted from other than the usual after results of approved medical care and treatment properly administered; that is, there must be a showing of accident, carelessness, negligence, etc., as indicated above. Finally, in concluding that October 1935 memorandum, the Solicitor stated his belief that the rating authorities should be instructed that, in applying the rule laid down therein to an individual case, a considerable degree of liberality should be exercised in evaluating the facts for the purpose of determining whether the disability proximately resulted through carelessness, accident, negligence, et cetera.

In a November 15, 1935, memorandum to the Administrator of Veterans Affairs, the Assistant Administrator referred to the October 24, 1935, memorandum of the Solicitor and indicated his opinion that a narrow construction of the term "accident" to exclude surgical accidents and all other types of accidents that may occur was entirely unwarranted. In response to that November 1935 memorandum, the

then Solicitor, on December 21, 1935 (23 Op. Sol. 552, 553), stated that he had not attempted to define the term "accident" in either the July 5, 1934, opinion, which formed the basis for Administrator's Decision No. 255, or in the memorandum of October 24, 1935. Rather, the Solicitor stated the following:

> "The courts have held that term 'accident' does not have a settled meaning, nor may the meaning of the word as generally used in statutes be determined by any dictionary definition alone, but the meaning of the word is influenced by the provisions of the statute in which it is used, as well as by the purpose for which the statute was enacted. (See 71 Corpus Juris 563: Words and Phrases, Volumes 1, 2, 3 and 4-Series.) The question as to what is an accident, for the purpose of determining entitlement to benefits under section 31, Public No. 141, 73d Congress, is one for determination by the adjudicating agencies."

This memorandum of the Solicitor was approved by the Administrator of Veterans Affairs on December 23, 1935.

As can be seen from the foregoing, the construction or interpretation of the statute, currently codified as 38 U.S.C. 351, has presented substantial difficulties in the past. Some of the difficulty seems to have resulted from the fact that administrative officials have not construed the language of the statute literally in determining whether benefits were payable for additional disability or death due to hospitalization, medical or surgical treatment. Rather, some proof of negligence, malpractice or fault on the part of the Veterans Administration has been deemed to be required prior to any payment of such compensation. (See VAR 1358(C)(3).) The word "accident" is currently employed in the pertinent part of the governing regulation (VAR 1358, paragraph (C)(3)) much as it was used in prior constructions of earlier law, now codified as section 351, supra. However, the concluding part thereof, "or similar instances of indicated fault on the part of the VA," purports to associate the word "accident" with other essentially synonymous words ("negligence," "carelessness," etc.) implying the necessity of the presence of some degree of fault where an individual is accidentally injured due to hospitalization, medical or surgical treatment. Such an association seems contrary to the basic meaning of the word "accident." Moreover, it can be seen, upon a review of the historical development surrounding the repeated use of the words "accident" and "negligence" in earlier years, that the word "accident" was not to be made dependent upon the associated provision "indicated fault on the part of the VA."

In a July 20, 1953, memorandum to the Administrator (XC 3 212 150), the then Solicitor opined that the word "accident" as used in the then applicable regulation (now VAR 1358) referred to an unintended event other than one resulting from negligence, or other fault. It was further indicated in that memorandum that, in the light of the history and construction of the statute, the word "accident" must be given the same meaning as the expression "accidental means" is utilized in insurance contract cases. The Solicitor summarized, in part, as follows:

> "Hence section 31 is applicable only if the injury, (or death), is *caused by* 'accidental means' which *means* arise out of the hospitalization. The conclusion that it was so caused is not legally per-

missible if the result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way. But if, in the act or event which precedes the injury, something unforseen, unexpected, or unsual, occurs, which produces the injury, it properly can be said to have resulted from accidental means. In short, the element of accident must consist in the event which produces (i.e. causes) the injury, rather than in the mere fact that an injury occurs, (the result)."

Footnoting the above, the Solicitor cited several cases, including *United States Mutual Accident Ass'n* v. *Barry*, 131 U.S. 100, 9 S. Ct. 755, 33 L. Ed. 60 (1889).

Administrator's Decision No. 944 (July 26, 1954) approved a portion of the July 20, 1953, memorandum, but no action was taken on the question of what was an "accident" within the meaning of the governing regulations. Prior to the promulgation of A.D. No. 944, the then General Counsel (formerly the Solicitor) in a memorandum to the Administrator dated January 29, 1954, proposed an addition to the then applicable regulation which would have defined the term "accident" essentially as it was stated in the July 20, 1953 memorandum. (See paragraph 11 above.) That proposal was not adopted, and at the conclusion of A.D. No. 944 it was noted that the question of "accident," whether in the popular (e.g., result of negligence) or the legal (i.e., accidental means) connotation, was not involved in that decision.

Upon a careful study of the legislative history of the law which was first enacted in 1924 and has since been codified as section 351 of title 38 of the United

States Code, it is our opinion that Congress intended to authorize the payment of compensation under section 351 for the additional disability or death deriving from an "accident," or in the alternative, from some form of negligence or fault on the part of the Veterans Administration. Based on the testimony of the then Director of the Veterans' Bureau at the hearing at which time the recommendation (ultimately culminating in section 351) was introduced, it appears clear that such legislation was offered for the purpose of having Congress authorize compensation for a veteran's additional disability arising from more than one category of unfortunate circumstance, resulting from hospitalization, medical or surgical care. While the legislative history of the statute indicates a concern for situations arising out of negligence, malpractice or some degree of fault on the part of the Veterans Administration, it does not seem to have excluded situations resulting from non-negligent accidents.

So far as the language of the statute (38 U.S.C. 351) is concerned, there is no requirement contained therein that negligence or other wrongful conduct by a Veterans Administration employee exist as a condition precedent to entitlement to compensation because of injury. Moreover, the precedent opinions cited above, construing the earlier law, place the word "accident" prior to the synonymous terms "carelessness" and "negligence." The ordinary meaning of the word "accident" is opposite that of "negligence," meaning essentially that such event is unforeseen, unexpected or fortuitous. Therefore, the term "accident" is outside the scope of meaning of all of the succeeding terms ("carelessness, negligence, lack of proper skill, error in judgment, etc.") used by the

Comptroller General in the 1930 opinion and by the Administrator in August 1934. (See Black's Law Dictionary, Rev. 4th Ed.; Vol. 1, Words and Phrases, "Accident.")

HELD: 1. Whenever an individual submits to surgical intervention, there are certain ill effects which may flow therefrom even though the operation is performed with the greatest possible degree of skill and precaution and no one is at fault. Such ill effects of surgery, albeit occurring rarely, are contemplated risks which are anticipated as happening in a certain percentage of surgical procedures and considered the normal hazards of surgery. While such occurrences may be designated as medical or surgical accidents by some, they are not true "accidents" within the ordinary meaning of the word, since such untoward results may be looked for or anticipated. Accordingly, it is my opinion that the term "accident" as used in earlier precedent opinions and Veterans Administration Regulation 1358(C)(3) does not include expected or contemplated risks of surgery, no matter how remote. Rather, the term "accident" should be interpreted for Veterans Administration purposes as meaning any unforeseen, untoward result of surgery, medical treatment or hospitalization.

2. In answer to the second question, there is no necessity of showing negligence or fault on the part of the Veterans Administration when an "accident" is found, in order for 38 U.S.C. 351 to be applicable. Such a conclusion broadly construes the statute with a view toward carrying out the apparent intent of Congress without doing violence to the plain language of the Act or disregarding the ordinary meaning of the words used.

3. On the basis of the foregoing, it is my opinion that the Veterans Administration is bound to pay compensation pursuant to section 351 when there exists a proximate, causal connection between any additional disability or death resulting from surgery, and the occurrence of an unforeseen, untoward event ("accident"). Any disability resulting from surgical intervention, which, although unusual, is expected or foreseeable as a normal hazard of surgery, should not produce compensation under section 351 unless the disability results from fault on the part of the Veterans Administration. In this connection, it should be noted that the Veterans Administration is not an absolute guarantor or insurer against additional disability or death occurring during surgical or medical treatment because, in order for section 351 to apply, injury or death must *proximately* result from Veterans Administration hospitalization, medical or surgical treatment, and the fact that injury or death is suffered *coincident* in point of time with such care or treatment does not suffice. (See 49 Op. Sol. 775, 780.)

/s/ Guy H. McMichael III
GUY H. MCMICHAEL III
General Counsel

NOTE: This opinion was released in the form of a memorandum to the Chairman, Board of Veterans Appeals on December 15, 1977.

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VA GENERAL COUNSEL'S PRECEDENTIAL OPINION

Date Issued: July 18, 1990 O.G.C. Precedent 80-90
From: General Counsel (02)

SUBJECT: Interpretation of 38 U.S.C. § 410 (b) (1) in Relation to 38 U.S.C. § 351 (This, opinion, previously issued as General Counsel Opinion 5-86, dated January 31, 1986, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: Chairman, Board of Veterans Appeals

QUESTION PRESENTED: May the surviving spouse of a veteran entitled to receive disability compensation continuously at the 100-percent rate for 10 or more years under 38 U.S.C. § 351, whose death was neither service-connected nor due to the disability for which compensation was paid under section 351, qualify to receive Dependency and Indemnity Compensation (DIC) under 38 U.S.C. § 410(b)(1)?

COMMENTS: For reasons that follow, the answer is yes. The veteran was, for more than 10 years preceding the veteran's death, continuously entitled to receive disability compensation at the 100-percent rate, under 38 U.S.C. § 351, because of disability that resulted from hospital treatment by the Veterans Administration (VA), independent of the veteran's service-connected disability. The veteran died May 27, 1984, because of illness unrelated either to the veteran's service-connected condition or the

condition for which compensation had been paid under section 351.

Section 351 states in pertinent part:

> "Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, [. . .] and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation [. . .] and dependency and indemnity compensation . . . shall be awarded in the same manner *as if* such disability, aggravation, or death were service-connected [. . . .]" (Emphasis added.)

Clearly, DIC would not be payable under section 351 in this case, because the disability for which the veteran qualified under section 351 was not a contributory cause of death. Nor would benefits be payable under section 410(a), which confers DIC eligibility for service-connected deaths. Therefore, entitlement to DIC, if it exists, must be found under section 410 (b)(1). Even so, as we shall discuss, the history of section 351 provides a helpful backdrop for proper construction of section 410(b)(1).

Section 410(b)(1) of title 38 states in pertinent part:

> "[W]hen any veteran dies, [. . .] if the veteran was in receipt of or entitled to receive [. . .] compensation at the time of death *for a service-connected disability* that [. . .] was continuously rated totally disabling for a period of ten or more years immediately preceding death, [. . .] the Administrator shall pay [. . .] [DIC] to the veteran's surviving spouse, [. . .] in the same

manner *as if* the veteran's death were service-connected." (Emphasis supplied.)

If those words were to be given a literal construction, DIC could not be paid in this case, as the veteran's section 351 entitlement for which compensation was paid did not exist because of a service-connected disability but because the veteran's treatment-derived disability was considered "as if" it were service connected, that is, quasi-service connected (see section 351, *supra*). However, it has long been held that the words of a statute are not always to be given their literal meaning. The Supreme Court, in 1922, held that where a literal construction "leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further." *Ozawa v. United States*, 260 U.S. 178, 194. Sections 351 and 410(b)(1) stand *in pari materia* and thus should be construed together. 2A *Sutherland Stat. Construction* § 51.01 (4th ed. 1984). As will be discussed, there would be a manifest inconsistency, which we believe Congress did not intend, between these provisions if section 410(b)(1) were interpreted to mean that survivors of veterans who drew disability compensation for service-connected disability could qualify for DIC, but survivors of veterans who drew disability compensation for quasi-service-connected disability could not.

The pertinent language of section 351 is essentially the same as that introduced into veterans' benefits law by section 213 of the World War Veterans' Act, 1924 (Ch. 320, 43 Stat. 607, 623). Both the language and history of the provision make clear that Congress intended that *all* veterans' monetary benefits payable for service-connected disability or death be payable for qualifying disability or death resulting from, among other things, medical examination or treatment in the same manner as though the disability or death had been a result of military service.* [* Provision is also made for such veterans' medical care. 38 U.S.C. § 610(a)(3).] *See* S. Rep. No. 397, 68th Cong., 1st Sess. 5 (1924); *Proposed Legislation as Recommended by the Director of the United States Veterans' Bureau, et al.: Hearings of H.R. 7320 Before the House Comm. on World War Veterans' Legislation*, 68th Cong., 1st Sess. 113 (1924). It would be impossible to achieve such result, insofar as DIC entitlement under section 410(b)(1) is concerned, if DIC were payable to the survivors of those who had been rated totally disabled for the requisite time because of service-connected disability, but not to the survivors of those who had been so rated for the requisite time because of quasi-service-connected disability.

We do not believe Congress intended such inconsistent result. "Experience indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of both, *without expressly recognizing the inconsistency*" (emphasis supplied.) *Sutherland, supra.* We believe that under this principle, if Congress had intended to preclude such payment, it would have expressed recognition of the inconsistency by specifically excluding such class of claimants from section 410(b)(1) coverage, which it did not do. "It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'" *Steelworkers v. Weber*, 443 U.S. 193, 201 (1979), quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1982). Furthermore, nothing in the history of the

provision indicates that Congress intended to create such exclusion. *See* history of Pub. L. No. 95-479, *infra*.

Section 410(b)(1) is in the nature of remedial legislation. *See* history of Pub. L. No. 95-479, § 204 (1978), S. Rep. No. 1054, 95th Cong., 2d Sess. 27-31, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3485-3489, wherein the Senate Committee on Veterans' Affairs went on record observing, "The appropriate Federal obligation to these survivors should . . . be the replacement of the support lost when the veteran dies," that is, "to provide income security to the survivors." As section 351 provides for quasi-service-connected disability, section 410(b)(1) provides for quasi-service-connected death. Such remedial legislation is to be broadly construed. (Indeed, section 351 was also characterized as remedial at its inception. S. Rep. No. 397, *supra*, at 1.) *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Similarly, the statute is entitled to expansive construction by virtue of its being in the nature of a public benefit, 2A *Sutherland*, *supra*, at § 54.05, and because of long-standing policy set forth in VA regulations, at 38 C.F.R. § 3.102. The intent of the legislature is paramount in statutory construction, and that intent may, as would be the case here, be defeated by giving a statute a too-literal interpretation. Equity sometimes requires enlargement of the letter of a statute so as to give effect to the legislative intent. *Beley v. Naphtaly*, 169 U.S. 353, 360 (1898). We believe, in light of what has been said, the references to service connection in the statute and in its history must be seen as merely descriptive of the usual basis upon which disability compensation is awarded, and not intended to preclude the entitlement of the section

410(b)(1) benefit to otherwise qualified survivors of veterans whose permanent disabilities were quasi-service-connected under section 351.

HELD: The surviving spouse of a veteran entitled to receive disability compensation continuously at the 100-percent rate for 10 or more years under 38 U.S.C. § 351, whose death was neither service connected nor due to the disability for which compensation was paid under section 351, may qualify to receive DIC under 38 U.S.C. § 410(b)(1).

/s/ Raoul L. Carroll
RAOUL L. CARROLL

VA GENERAL COUNSEL'S PRECEDENTIAL OPINION

DEPARTMENT OF
VETERANS AFFAIRS

Memorandum
O.G.C. *Precedent Opinion* 99-90

December 24, 1990

From General Counsel (022)

Sub. Benefits under 38 U.S.C. § 351 for HIV infection acquired through blood transfusion; CHRISTIAN, C. SS 587 50 5666; KNIPPER, A. XC 11 992 383; ROBINSON, T. XSS 224 16 9712

To: Chairman, Board of Veterans Appeals (01)

QUESTION PRESENTED:

May the term "accident," as used in 38 C.F.R. § 3.358(c)(3) concerning medical and surgical procedures and care, include events which by their nature are only remotely foreseeable?

COMMENTS:

1. Your opinion request of December 18, 1989, involves three claims for benefits under 38 U.S.C. § 351 which are currently on appeal to the Board of Veterans Appeals. In reviewing the questions raised in your request, we wish to emphasize that we have not attempted to make any factual determinations in the cases. The responsibility for such determination rests with the Board.

2. The first veteran received blood transfusions during VA hospitalizations in 1978 and 1979. Acquired

immunodeficiency syndrome (AIDS) was diagnosed in June 1986 and the veteran died in July 1986. The second and third veterans received blood transfusions during VA hospitalizations in May and September 1984, respectively. One was diagnosed as having AIDS in July 1985 and died in February 1986. The other tested positive for human immunodeficiency virus (HIV) in September 1985. Service connection has not been established for any disability in these cases. It will be assumed, for purposes of this opinion, that all three veterans contracted HIV, which causes AIDS, as a result of blood transfusions properly administered during their VA medical and/or surgical treatment. Whether this assumption is correct with respect to any or all of these cases is, of course, a factual issue for resolution by the Board.

3. Monetary benefits are available pursuant to 38 U.S.C. § 351 for disability caused by "injuries" resulting from VA medical and surgical care. The regulatory framework developed by VA to implement this provision is contained at 38 C.F.R. § 3.358. Pertinent to this opinion is the limitation at subsection 3.358(c)(3):

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an "*accident*" (an unforeseen, un-

> toward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

(Emphasis added.) Thus, benefits under 38 U.S.C. § 351 are currently payable, pursuant to 38 C.F.R. § 3.358, for additional disability resulting from VA medical treatment which is not properly administered or in the event of an "accident." Since a 1978 General Counsel Opinion, "accident" has been considered to mean "any unforeseen, untoward result of surgery, medical treatment or hospitalization." Op. G.C. # 2-78 (10-25-78). This interpretation has removed from consideration all types of "accidents" which represent foreseeable, however remotely so, consequences of medical care and treatment. As the facts you present do not suggest that these three veterans received less than proper medical care, we will narrow our focus to consideration of the term "accident" as employed in the regulation.

4. In applying the definition of "accident" currently contained in 38 C.F.R. § 3.358(c)(3) to the claims before us, we note that the two veterans who received blood transfusions in 1984 did so at a time when it was rapidly being accepted by the medical profession that infection with HIV could occur as a result of a blood transfusion. Even the veteran who received transfusions in 1978 and 1979, well before AIDS had become recognized as a disease entity, could be held to have contracted a disability which was "foreseeable" in that all invasive procedures are known to involve a risk of infection. **In view of the restrictive nature of VA's regulation in this regard, evaluation of its genesis is warranted.**

5. We begin by reviewing the applicable legislative history of section 351. A provision similar to the current version of 38 U.S.C. § 351 was first enacted in 1924, on recommendation of the Veterans' Bureau. *See* The World War Veterans' Act, Pub. L. No. 68-242, sec. 213 (1924). It provided:

> That where any beneficiary of this bureau suffers or has suffered an injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him by the director and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title shall be awarded in the same manner as though such disability, aggravation, or death was the result of military service during the World War.

General Frank T. Hines, then Director of the Veterans' Bureau, explained in a letter dated December 3, 1923 to the Chairman of the Select Committee on Investigation of the United States Veterans' Bureau, that the Bureau favored "and recommended" a proposal of the Disabled American Veterans that any person who suffered an injury due to his work or study in line with, or caused by his vocational training or placement training, be compensated. Of that proposal, he stated:

> This is new. I concur in the principle that authority should exist for compensating the cases of disability due to the hazards of training upon the general theory and principle of the workmen's compensation act. I would extend the principle beyond this particular proposal to include

> also ratable disabilities incurred without fault and due to the hazards of medical and surgical treatment. It seems that the whole purpose of giving such treatment or of giving training is defeated if, in the course of the training or treatment, a disability is incurred without fault and due solely to the training and treatment for which there is no authority to compensate because of course, such disability is not directly connected with the service. I recommend this principle to your thoughtful consideration.

Reprinted in Hearings before the House Committee on World War Veterans' Legislation, 68th Congress, 1st Session, conducted in February 1924 on H.R. 7320, at 122. In testimony before the Committee on World War Veterans' Legislation, General Hines explained the need for the benefit in this manner:

> [I]n cases of hospitalization for compensable diseases or injuries, where without fault of the patient, as the result of *accident* or negligence of treatment or unskillfulness—things that must sometimes happen—the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof.

(Emphasis added.) Hearings before the House Committee on World War Veterans' Legislation, 68th Congress, 1st Session, at 112 (Feb. 26, 1924). During that same hearing, in a subsequent exchange, General Hines acknowledged upon further questioning that "greater disability" sometimes occurs despite a veteran having received "the best medical advice" and after a doctor "does the best he can and without neglect." 1924 Hearings, *supra*, at 114.

6. This legislative history reflects that disability stemming from non-negligent events was contemplated by those seeking enactment of the measure and the word "accident" was the term employed to describe that "branch" or class of events.

7. Section 213 was repealed by Public Law No. 73-2, 48 Stat. 14 (1933). Then, in 1934, Senator Steiwer, by offering an amendment to H.R. 6663 (which became Public Law No. 73-141) effected a reenactment of the provision. However, his description of the measure reflected a more restricted view of its coverage:

> The first merely provides, in effect, that where a veteran is injured because of malpractice, he shall receive compensation just the same as though his disability were of war-service origin . . . [W]here, in a veterans' hospital, a veteran is disabled by reason of mistreatment on the part of a Government agent, as in a case of malpractice by a Government surgeon, that disability shall be treated just the same as a war disability, and the veteran shall be compensated in the same way.

78 Cong. Rec. 3289 (Feb. 27, 1934). Upon questioning as to how it would be determined that there had been a case of malpractice, Senator Steiwer answered:

> I do not know what the Veterans' Administration can determine that there has been a case of malpractice, but they do determine that the veteran is suffering from disability, and in some cases they have determined that the disability was caused by or aggravated by some mistreatment upon the part of the veterans' agencies. I do not think there has ever been any trial of a doctor

> to determine malpractice, and I am told—and I ought to say in fairness to the Veterans' Administration—that in recent years there have been very few of these unfortunate cases . . . who have suffered at the hands of Veterans' Administration physicians. They were swept off all the rolls by the Economy Act. We seek by this amendment to put that little group back where they can be dealt with generously by their Government.

78 Cong. Rec. 3289-90. On that same date, Senator Steiwer referred to what he had previously stated as the explanation of this provision. He stated, "I shall not explain it further, except to say that the language employed in this amendment, as nearly as I can remember, is a mere reenactment of the law as it existed prior to the Economy Act." 78 Cong. Rec. 3298 (Feb. 27, 1934). Thus, the legislative history surrounding reenactment of this provision must be considered somewhat ambiguous.

8. The provision described by Senator Steiwer became section 31 of Public Law No. 73-141, 48 Stat. 526 (1934):

> Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury, as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits . . . benefits . . . shall be awarded in the same manner as if such disability, aggravation, or death were service connected.

This is almost identical to the current language of 38 U.S.C. § 351. Congress expanded its provisions in 1940 to include veterans who sustain injuries as a result of examinations, Pub. L. No. 76-866, sec. 12, 54 Stat. 1193, 1197 (1940), and in 1943 to include veterans who suffer additional injury as a result of vocational rehabilitation, Pub. L. No. 78-16, sec. 4, 57 Stat. 43, 44 (1943). Also, an offset against amounts awarded as a result of an action under the Federal Torts Claims Act was provided in 1962. Pub. L. No. 57-825, 76 Stat. 948 (1962).

9. The original construction placed on section 213 by the Veterans' Bureau was a broad one. An outline of the history of that original construction is provided in a memorandum of October 24, 1935 of the then Solicitor of the Veterans Administration (VA) and this opinion will not recite all the details. However, we note that the Solicitor acknowledged in his memorandum the role played by an early Comptroller General opinion in providing VA with its regulatory language, including the word "accident."

10. Specifically, Comptroller General Decision No. A-31895, 9 Comp. Gen. 515 (1930) considered the issue of whether a veteran could be granted compensation under section 213 of the World War Veterans' Act of 1924, for a disability resulting from hospitalization awarded the veteran for treatment of an existing disability, which at the time of treatment was considered to be service connected but was subsequently determined to be non-service connected. The Comptroller General held that compensation under section 213 was payable notwithstanding the breaking of service connection. In addition to that holding, the decision contained the statement that "the plain intent of section 213 of the World War Veterans' Act, 1924, as amended, was to afford veterans some measure of compensation in those cases in which the disability arises through *accident*, carelessness, negli-

gence, lack of proper skill, error in judgment, etc. . . ." (Emphasis added.) The statement was gratuitous and largely irrelevant *obiter dictum*. However, it was cited in Administrator's Decision No. 255, dated August 9, 1934, and was relied upon to support a holding that section 213 benefits were payable *only* when the disability arose through accident, carelessness, negligence, etc. Although, the precise question was not before the Comptroller General, this statement did reflect a contemporaneous interpretation of the congressional intent behind the unique benefits granted by the provisions of section 213, Pub. L. No. 68-242. In the same way, the Administrator's 1934 decision (No. 255) represents a contemporaneous interpretation of the "reenactment" statute, a slightly different version from that of 1924. The Administrator was of the opinion that:

> It is apparent that it was the intent of Congress to reenact the law as it existed in section 213 of the World War Veterans' Act, 1924, as amended, prior to the approval of Public No. 2, Seventy third Congress. Accordingly, the instructions and precedents governing the determination of entitlement to benefits under section 213 of the World War Veterans' Act, as amended, are applicable in determining entitlement to benefits under section 31 of Public No. 141.

Administrator's Decision No. 255 (8-9-34).

11. Perhaps the best summary of the position VA finally took in interperting this statute is contained in the Solicitor's Memorandum of October 24, 1935:

> [T]he law does not require the claimant to show malpractice but . . . there must be more than a mere showing that the disability resulted from

> other than the usual after results of approved medical care and treatment properly administered. There must be a showing of *accident*, carelessness, negligence . . . (emphasis added).

Chairman, Board of Veterans Appeals (01)

However, this view had altered by July 1953, as shown in a memorandum on the subject from the then Solicitor to the Administrator. It was his position that section 31 was applicable only if injury, or death, were caused by "accidental means," an expression utilized in insurance contract cases. That is, "if in the act or event which precedes the injury, something unforseen, unexpected, or unusual occurs, which produces the injury, it properly can be said to have resulted from accidental means." Solicitor's Memorandum of July 20, 1953.

12. In February 1961, VA amended part 3 of title 38, Code of Federal Regulations. Then, new section 3.358 included the following provision:

> Compensation is not payable for either the usual or unusual after results of approved medical care properly administered, in the absence of a showing that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Veterans Administration.

26 Fed. Reg. 1590-91 (Feb. 24, 1961). As noted in the General Counsel opinion of October 25, 1978, this regulatory language equated "accidents" with instances of "indicated fault" (in terms of giving rise to compensation eligibility). As accepted in that opinion, the "ordinary meaning of the word 'accident'

is opposite that of 'negligence.'" Op. G.C. #2-78. One holding in the 1978 opinion was that:

> [T]here is no necessity of showing negligence or fault on the part of the Veterans Administration when an "accident" is found . . . . Such a conclusion broadly construes the statute with a view toward carrying out the apparent intent of Congress without doing violence to the plain language of the Act or disregarding the ordinary meaning of the words used.

Op. G.C. #2-78 (10-24-78). We agree with that particular conclusion in the opinion. However, the definition of "accident" contained therein, "any unforeseen, untoward result" and the regulatory provision resulting therefrom, 43 Fed. Reg. 51015 (11/2/78), do not allow grants of benefits in certain cases we believe fall reasonably within the realm contemplated by Congress when creating this benefit. Specifically, we do not believe the statute should be read as failing to authorize compensation for injuries resulting from events which are to *any* degree foreseen or forseeable. Perhaps the problem results from advances in medical technology. While still falling short of providing us with a total understanding of the workings of the human body and the diseases that prey upon it, scientists have provided us with a thorough understanding of the multiplicity of "risks" inherent to medical/surgical intervention and care. Currently, it seems that almost no medical event, including the AIDS phenomenon, is now totally "unforeseeable."

15. Having recognized that the current regulatory definition of "accident" is too restrictive in view of the legislative history of 38 U.S.C. § 351, we are tasked with providing a "definition" which will aid

in the case-by-case application of those provisions. To this end, we suggest that it is appropriate to consider claims initially for indications of carelessness or other "indicated fault." If none is found, the fact-finder must review the evidence surrounding the veterans' medical and surgical care seeking to determine whether "accidents" occurred. That is, were there any events which were truly unexpected or not reasonably foreseeable and which involved additional "injury?" This reasoned approach does not represent a literal, *i.e.*, strict-liability, interpretation of section 351. For instance, medical procedures often involve a common and, thus, clearly-recognized risk of additional injury. Such results, although representing an undesired outcome of treatment, should not be viewed by a fact-finder as an accident because their occurrence was reasonably foreseeable. Also, in cases where the only treatment that can possibly arrest a life-threatening condition involves a high risk of additional injury or death, in our view, the circumstances involved in such cases dictate only one reasonable conclusion, that the additional injury or death should be considered to result from the disease or injury itself rather than be classified as an "accident."

16. Appropriate amendment along these lines is being recommended to the Veterans Benefits Administration and will provide rating personnel, as well as the Board, the guidance needed to avoid absurd results, while providing claimants with the compensation statutorily authorized under Section 351.

HELD:

The provisions of 38 C.F.R. § 3.358(c)(3) divide events into two categories, those occurring due to improper or negligent care and those considered "ac-

cidents." This latter term was previously defined by the General Counsel as including only unforeseen, untoward results of surgery, medical treatment or hospitalization and not including expected or contemplated risks of surgery, no matter how remote. In view of the legislative history of 38 U.S.C. § 351, this definition has proven too restrictive to serve as a guideline in awarding benefits under this statute. Instead, those charged with consideration of claims for benefits under 38 U.S.C. § 351 must consider the consequences of medical and surgical care in the light of whether they are unexpected or not reasonably foreseeable. Thus, if it is determined an individual is infected with human immunodeficiency virus as a result of a blood transfusion administered by VA at a time when that type of infection as a result of blood transfusions was not *reasonably* foreseeable—an accident—that individual may receive benefits under 38 U.S.C. § 351.

/s/ Raoul L. Carroll
RAOUL L. CARROLL

Attachment: C-files (3)

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No. 93-1128

In the Supreme Court of the United States

OCTOBER TERM, 1993

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
PETITIONER

v.

FRED P. GARDNER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

A federal statute initially enacted in 1924 provides that veterans injured as the result of treatment at hospitals operated by the Department of Veterans Affairs are, in some circumstances, entitled to disability compensation as though their medical injuries were service-connected. For at least 60 years, VA regulations have uniformly construed this statute to provide for compensation only where there is a showing of fault on the part of the VA or of a medical "accident." The question in this case is whether the Court of Appeals for the Federal Circuit erred in refusing to defer to this longstanding administrative construction and in holding, instead, that the statute creates liability without fault.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1128

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
PETITIONER

v.

FRED P. GARDNER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 5 F.3d 1456. The opinion of the Court of Veterans Appeals (Pet. App. 22a-30a) is reported at 1 Vet. App. 584. The opinion of the Board of Veterans' Appeals (Pet. App. 32a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1993. On December 6, 1993, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 11, 1994. The petition was filed on that date and was granted on

April 4, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 38 U.S.C. 1151 (Supp. IV 1992) provides as follows:

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Secretary [of Veterans Affairs], or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or, on or after December 1, 1962, enters into a settlement or compromise under section 2672 or 2677 of title 28 by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of

> such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

2. The current regulation implementing Section 1151, 38 C.F.R. 3.358, provides in part as follows:

> (a) *General.* Where it is determined that there is additional disability resulting from a disease or injury or an aggravation of an existing disease or injury suffered as a result of training, hospitalization, medical or surgical treatment, or examination, compensation will be payable for such additional disability.
>
> (b) *Additional disability.* In determining that additional disability exists, the following considerations will govern:
>
> (1) The beneficiary's physical condition immediately prior to the disease or injury on which the claim for compensation is based will be compared with the subsequent physical condition resulting from the disease or injury, each body part involved being considered separately.
>
> (i) As applied to examinations, the physical condition prior to the disease or injury will be the condition at time of beginning the physical examination as a result of which the disease or injury was sustained.
>
> (ii) As applied to medical or surgical treatment, the physical condition prior to the disease or injury will be the condition which the specific

medical or surgical treatment was designed to relieve.

(2) Compensation will not be payable under 38 U.S.C. 1151 for the continuance or natural progress of disease or injuries for which the training, or hospitalization, etc., was authorized.

(c) *Cause.* In determining whether such additional disability resulted from a disease or an injury or an aggravation of an existing disease or injury suffered as a result of training, hospitalization, medical or surgical treatment, or examination, the following considerations will govern:

(1) It will be necessary to show that the additional disability is actually the result of such disease or injury or an aggravation of an existing disease or injury and not merely coincidental therewith.

(2) The mere fact that aggravation occurred will not suffice to make the additional disability compensable in the absence of proof that it resulted from disease or injury or an aggravation of an existing disease or injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination.

(3) Compensation is not payable for either the contemplated or foreseeable after[-]results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or

similar instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

3. Section 31 of the Act of Mar. 28, 1934, ch. 102, Tit. III, 48 Stat. 526, formerly codified at 38 U.S.C. 501a (1952), provided as follows (before its repeal by the Veterans' Benefits Act of 1957, Pub. L. No. 85-56, § 2202(132), 71 Stat. 168):

> Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury, as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits to World War veterans, or as the result of having submitted to examination under authority of the War Risk Insurance Act or the World War Veterans' Act, 1924, as amended, and not the result of his misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, the benefits of Public Law Numbered 2, of Public Law Numbered 78, and of this title shall be awarded in the same manner as if such disability, aggravation, or death were service connected within the meaning of such laws; except that no benefits under this section shall be awarded unless application be made therefor within two years after such injury or aggravation was suffered, or such death occurred,

or after the passage of this Act, whichever is the later date. The benefits of this section shall be in lieu of the benefits under the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916, as amended.

4. Section 213 of the World War Veterans' Act, 1924, ch. 320, 43 Stat. 623, provided as follows (before its repeal by the Act of Mar. 20, 1933, ch. 3, Tit. I, § 17, 48 Stat. 11):

> That where any beneficiary of this bureau suffers or has suffered an injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him by the director and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title shall be awarded in the same manner as though such disability, aggravation, or death was the result of military service during the World War. The benefits of this section shall be in lieu of the benefits under the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,' approved September 7, 1916; and from any payments due hereunder shall be deducted all amounts paid by any person other than [the] United States as damages or compensation for such injury, aggravation, or death: *Provided*,

> That application be made for such benefits within one year after such injury or aggravation was suffered or such death occurred or after the passage of this Act or whichever is the latest date.

5. VA Regulation Nos. 137 (June 11, 1926), 157 (Sept. 15, 1926) and 167 (Feb. 21, 1927) and VA Regulations & Procedure §§ R-1120 through R-1122 (1930) are reprinted in pertinent part at App., *infra*, 1a-10a.

STATEMENT

Respondent served on active duty with the United States armed forces from April, 1953, to January, 1955. Pet. App. 33a. In 1986 respondent was admitted to a hospital operated by the Department of Veterans Affairs (VA)[1] for evaluation and treatment of pain in his legs. *Ibid.* The condition for which respondent sought treatment was not connected in any way to his prior military service.[2] See *id.* at 2a. VA physicians correctly diagnosed a herniated disc, and after other treatments failed they performed surgery to remove the disc. *Ibid.*

---

[1] We follow the court of appeals (Pet. App. 2a n.1) in referring to the Department and its predecessors, the Veterans' Administration and the Veterans' Bureau, collectively as the VA.

[2] Veterans with non-service-connected conditions are eligible for VA medical care based on criteria such as availability of VA facilities, ability to pay, and whether the veteran also has a service-connected condition. Respondent was entitled to VA care for his non-service-connected back condition under what was then 38 U.S.C. 610(a) (1982), now recodified at 38 U.S.C. 1710(a) (Supp. IV 1992).

Although respondent's surgery was successful in removing the herniated disc, respondent subsequently experienced problems with his left calf, ankle and foot. Pet. App. 34a-35a. Asserting that those problems resulted from the surgery, respondent filed a claim for disability benefits under what is now 38 U.S.C. 1151 (Supp. IV 1992) (previously codified at 38 U.S.C. 351 (1988)). That statute provides that additional disability resulting from "an injury, or an aggravation of an injury, [suffered] as the result of * * * medical or surgical treatment * * * awarded under any of the laws administered by the Secretary" will be treated as though it were "service-connected," thus making the veteran eligible for a variety of medical, disability and other benefits.[3]

The VA's regional office denied respondent's claim for disability benefits (see Pet. App. 2a), and the Department's Board of Veterans' Appeals affirmed. *Id.* at 32a-40a. After reviewing the medical evidence (*id.* at 33a-35a), the Board pointed out (*id.* at 36a) that under Section 3.358(c)(3) of the Department's regulations, a disability will be treated as compensable under Section 1151 only if it "proximately resulted

[3] Although the phrase "additional disability" suggests that Section 1151 was drafted to deal with incremental disabilities to veterans already suffering from service-connected injuries, as a practical matter the interpretive issue before the Court is important primarily for claims, like respondent's, based on disabilities resulting from care provided for *non*-service-connected conditions. Additional disabilities resulting from care provided by VA for service-connected conditions are generally compensable, either under Section 1151 (where the veteran can show fault) or under other statutory and regulatory provisions. See 38 U.S.C. 1110, 1131 (Supp. IV 1992); 38 C.F.R. 3.310(a).

[from] carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of the VA, or from the occurrence of an "accident," defined in the regulation as "an unforeseen, untoward event." 38 C.F.R. 3.358(c)(3).[4] Reviewing the evidence in light of that standard, the Board found (Pet. App. 37a) no "indication that treatment afforded [respondent] was in any way negligent, or at variance with sound medical practice, or was otherwise at fault." Similarly, the Board found no "untoward result in the sense contemplated by the law and regulation." *Ibid.*; see also *id.* at 38a-39a. Rather, the Board concluded that the problem respondent was experiencing with his foot was "a common, foreseeable result of such surgery." *Id.* at 37a. Finally, the Board found (*id.* at 37a-38a) that respondent had demonstrated no post-operative increase in the preexisting (*id.* at 35a, 38a) weakness of his left ankle, and that any calf and ankle weakness were caused by that condition and were "not in any way related to the [surgery]." The Board therefore denied respondent's claim.

[4] The VA once interpreted the "unforeseeability" aspect of this definition of "accident" so as to exclude "contemplated risks of surgery, no matter how remote." See V.A. Gen. Coun. Op. 2-78, at 5 (1978) (J.A. 11, 22). In December, 1990, however, the VA adopted a somewhat broader construction, treating as "accidental" those consequences of medical or surgical care that are "not *reasonably* foreseeable." V.A. Gen. Coun. Op. 99-90, at 10 (1990) (J.A. 30, 42). The current administrative interpretation thus excludes from compensation only the natural worsening of a veteran's original condition (*i.e.*, a condition not arising out of VA treatment) and the contemplated or reasonably foreseeable consequences of careful medical treatment.

The Court of Veterans Appeals reversed. Pet. App. 22a-30a. It held that the statute itself neither imposed nor authorized the fault-or-accident requirement invoked by the Board under Section 3.358(c)(3) of the regulations.[5] The court reasoned (Pet. App. 25a-27a) that the statute's plain language imposed no fault requirement, and that a no-fault construction was plausible and would not lead to absurd results. The court rejected (*id.* at 28a-30a) the Secretary's arguments that the legislative history demonstrated an intent to provide compensation only in cases of fault or accident, that repeated congressional reenactment or amendment of the statutory language had ratified the Secretary's longstanding regulatory interpretation, and that the Secretary's construction was entitled to deference. The court therefore invalidated Section 3.358(c)(3) as inconsistent with the statute. Pet. App. 30a. Because the Board had relied in part on Section 3.358(c)(3) in reaching its decision, the court remanded the case for a redetermination of respondent's claim without reference to that provision.

The Court of Appeals for the Federal Circuit affirmed. Pet. App. 1a-21a. That court reasoned, as had the Court of Veterans Appeals, that the plain language of the statute lacked a fault or accident element; it rejected the Secretary's contention that the statutory language referring to injuries suffered

[5] Respondent, acting *pro se*, did not raise the issue whether Section 3.358(c)(3) represented a permissible interpretation of the governing statute. The Court of Veterans Appeals *sua sponte* ordered supplemental briefing on that issue, and appointed respondent's present counsel to brief and argue the issue as *amicus curiae* on behalf of respondent. See C.A. App. 9 (3/15/91 docket entry).

"as the result of" VA care was at least ambiguous on that point. *Id.* at 4a-9a. It undertook (*id.* at 9a-18a) an extensive review of the history of the statute's original enactment, reenactment, and regulatory interpretation, and concluded (*id.* at 18a) that the Secretary had failed to make the "extraordinarily strong showing of clear legislative intent" (*id.* at 9a) necessary to convince it to depart from what it viewed as the clear language of the statute. The court declined to defer to the Secretary's interpretation of the statute on the grounds that the statutory language was clear, the regulatory interpretation was not contemporaneous with the original enactment of the statute, and the regulation's long history was not highly probative in light of the fact that VA regulations did not become subject to judicial review until the creation of the Court of Veterans Appeals in 1988. *Id.* at 18a-20a. Finally, the court rejected (*id.* at 20a-21a) the Secretary's argument that Congress had ratified the VA's interpretation by reenacting the statute, and amending it in related ways, after the regulation in question had become well-established.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 1151 provides that "[w]here any veteran shall have suffered an injury, or an aggravation of an injury, as the result of * * * medical or surgical treatment * * * awarded under any of the laws administered by the Secretary, * * * and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran," the VA will pay compensation for the incremental disability

or death in the same manner as if it were service-connected. 38 U.S.C. 1151 (Supp. IV 1992).

The court of appeals' decision in this case rests primarily on what the court deemed to be the plain language of the statute: in the court's view, the statute "unambiguously does not require the veteran to prove that the VA treatment was faulty or that an accident occurred during the treatment." Pet. App. 9a. That conclusion, however, ignores ambiguity inherent in the statutory language. Moreover, the court of appeals disregarded the significance of the context and history of the provision. When first enacted in 1924, and when repealed and reenacted ten years later in the midst of the Great Depression, Section 1151 was viewed as a minor adjunct to the provision of medical care for already disabled veterans. The court of appeals' construction, however, would treat the statute as a major expansion of governmental liability for VA medical treatment well beyond prevailing common-law norms. In addition, the court's broad interpretation ignores more than sixty years of narrow construction by the agency charged with administration of the statute, and substantial evidence of congressional ratification of and acquiescence in that agency construction.

Appropriate use of the "traditional tools of statutory construction" thus makes clear that, contrary to the court of appeals' decision, the question in this case cannot be finally resolved simply by reference to the statutory text. *Chevron U.S.A. Inc.* v. *Natural Resources Defence Council, Inc.*, 467 U.S. 837, 842-843 & n.9 (1984). In those circumstances, the court of appeals should have deferred to the VA's reasonable,

contemporaneous and longstanding construction of the statute.

ARGUMENT

I. THE SECRETARY'S LONGSTANDING INTERPRETATION OF SECTION 1151 RESTS ON A PERMISSIBLE CONSTRUCTION OF THE STATUTORY LANGUAGE

The court of appeals found that the language of 38 U.S.C. 1151 (Supp. IV 1992) "unambiguously does not require the veteran to prove that the VA treatment was faulty or that an accident occurred during the treatment." Pet. App. 9a. That conclusion ignores important ambiguities in the statutory text.

A. First, Section 1151 applies to veterans who have "suffered an injury" as the result of VA medical care. While the most general definition of the term "injury" is any "hurt, damage, or loss sustained," the word is also used to refer more specifically to "an unjust or undeserved infliction of suffering or harm," or in its legal sense to a "violation of another's rights for which the law allows an action." *Webster's Third New International Dictionary* 1164 (1986).[6] Com-

[6] See also I *The New Shorter Oxford English Dictionary* 1371 (1993) (giving, as the primary definition of "injury," "wrongful action or treatment; violation or infringement of another's rights; suffering wilfully inflicted; a wrongful act; a wrong inflicted or suffered"); 2 *Bouvier's Law Dictionary* 1580-1581 (3d rev. 1914) ("A wrong or tort"; "Any legal wrong which will give a cause of action to the one whose rights, person or property are injured thereby"; "the wrongful act or tort which causes loss or harm to another"); 3 Blackstone, *Commentaries* 122 (1772) ("Injuries, affecting a man's *health*, are where by any unwholesome practices of another a man sustains any apparent damage in his vigour or constitution. As

mon usage also frequently associates the term "injury" with the intentional, accidental or negligent infliction of harm. Thus, even as a general matter the word "injury," as used in Section 1151, could well include some connotation of fault or of an "unforeseen, untoward event." 38 C.F.R. 3.358(c)(3). In the particular context of medical "injuries," that connotation is not only possible but likely.[7] See *People* v. *Superior Court*, 252 Cal. Rptr. 335, 341 (Cal. Ct. App. 1988) ("A commonsense interpretation of 'injury' as used in this section [imposing criminal penalties on persons causing or permitting adult dependents to be "injured"], applies not to injuries such as would be inflicted on a patient by a medical care practitioner using ordinary care in the course of treatment, but applies to nontherapeutic conduct or gross, reckless

* * * by the neglect or unskillful management of his physician, surgeon, or apothecary.").

[7] *Urie* v. *Thompson*, 337 U.S. 163, 180-187 (1949), is not to the contrary. In *Urie*, this Court interpreted the word "injury" as used in the Federal Employers' Liability Act (FELA) to encompass occupational diseases arising from employer negligence, whether or not their occurrence could be described as "accidental." *Urie* emphasized, however, that FELA was a negligence statute, and held only that "the incurring of a disease or harm to health" could be an "injury" in a context where, as at common law or under FELA, "the other elements of liability for tort are present." 337 U.S. at 182. That holding is fully consistent with the VA's reading of Section 1151. Moreover, *Urie*'s emphasis on the common-law background of the statute is instructive. In the case of medical "injuries," the common law has always required proof of fault before allowing recovery. See pages 19-20, *infra*.

or culpable departures from the ordinary standard of care.").[8]

Moreover, we do not understand either respondent or the court of appeals to suggest that Section 1151 requires compensation for disabilities necessarily resulting from completely appropriate and careful

[8] Section 1151 also provides benefits for any veteran who suffers "an aggravation of an injury" as a result of VA treatment. 38 U.S.C. 1151 (Supp. IV 1992). That use of the term "injury" relates to the veteran's condition prior to treatment, and thus has little relevance to what sort of showing must be made before an "injury" or "aggravation" caused by later medical treatment will require compensation by the VA. Cf. 38 U.S.C. 1153 (Supp. IV 1992) (service-connected aggravation of pre-service "injury"). The fact that veterans who are treated for service-connected conditions are compensated, under Section 1151 and other provisions, for resulting disabilities whether or not they can show fault (see note 3, *supra*) is similarly explained by the origin of the treated condition. The basic premise of compensation for service-connected disabilities is that the government will assume responsibility for conditions contracted by service members "in line of duty." In defining what constitutes the "line of duty," Congress has generally required only a temporal relationship between duty status and the onset of a condition. See 38 U.S.C. 105 (1988 & Supp. IV 1992). Compensation under Section 1151, on the other hand, is not based on a general assumption of national responsibility for the veteran's underlying condition, but on some specific connection between treatment rendered by the VA and a post-treatment disability. It is not surprising that Congress would require a showing of fault or "accident" before assuming responsibility for the latter class of cases. Cf. Administrator of Veterans' Affairs Ann. Rep. 1-3, 8-9 (1933) (emphasizing differentiation between service-connected and non-service-connected disabilities in implementing cost-saving measures due to economic crisis) (*quoted in part at* note 21, *infra*).

medical treatment—shortness of breath, for example, resulting from removal of a diseased lung.[9] See Br. in Opp. 17 n.7. Yet such a result would presumably qualify as an "injury" within the broadest definition of that term ("hurt, damage, or loss sustained"). Thus, the dictionary by itself does not supply an unambiguously correct meaning for the term "injury" in its statutory context in this case. See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992).

B. Second, to be compensable a veteran's "injury" must occur "as the result of" an activity specified in the statute, including medical treatment. 38 U.S.C. 1151 (Supp. IV 1992). The court of appeals correctly observed that under that language "the specified treatment must *cause* the injury" for which the veteran claims compensation. Pet. App. 8a. But the court passed too quickly from that statement to its conclusion (*id.* at 9a) that the statutory causation requirement includes no element of fault or unforeseeability.

It is true, as the court of appeals noted (Pet. App. 8a), that "[c]ausation and fault * * * are fundamental, distinct concepts in the law." It is equally true, however, that the law routinely recognizes the need

[9] Indeed, even an explicit proposal to replace common-law tort liability for malpractice with a "no-fault" system would have withheld compensation for harms "consistent with or reasonably to be expected as a consequence of" medical care. See P. Danzon, *Medical Malpractice: Theory, Evidence, and Public Policy* 214-215 (1985) (quoting E. Roth & P. Rosenthal, *Non Fault Based Medical Injury Compensation Systems, in* Dep't of HEW, *Report of the Secretary's Commission on Medical Malpractice* App., at 450, 460 (1973)).

for both factual and legal, or "proximate," causation. See, *e.g.*, W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 41, at 263 (5th ed. 1984). The Secretary's regulations reflect that dual nature of the concept of causation. Under 38 C.F.R. 3.358(b), a claimant must first show factual causation by demonstrating that his or her physical condition worsened after treatment by the VA, and that the deterioration cannot be accounted for by "the continuance or natural progress of [the] disease or injuries for which" VA treatment was originally authorized. Similarly, under Section 3.358(c)(1)-(2), the claimant must show that the demonstrated deterioration is "actually the result" of treatment, "not merely coincidental therewith."[10] Finally, under Section 3.358(c)(3), the claimant must show legal causation as well—*i.e.*, that the "injury" sustained is one of the sort for which Congress intended to provide compensation.

In opposing certiorari, respondent conceded that Section 1151 would not provide benefits for an amputation necessary to remove a gangrenous leg. Br. in Opp. 17 n.7. In doing so, respondent relied on the initial cause-in-fact determinations called for by

[10] Although its opinion is not entirely clear, the Board of Veterans' Appeals found that there was no such factual causal link between at least some of respondent's complaints and his VA surgery. See pages 8-9, *supra*; Pet. App. 37a-38a. The Court of Veterans Appeals and the Federal Circuit disregarded that finding, and focused exclusively on the fault-or-accident issue under the regulations. See *id.* at 3a, 23a. If respondent prevails on that issue in this Court, on remand the Board will have the opportunity to clarify the scope of its findings with respect to factual causation.

the regulations. *Ibid.*, citing 38 C.F.R. 3.358(b)(2) and (c)(1). If respondent's view of this case rests on the "plain language" of the statute, however, it is difficult to see why the loss of an amputated leg is not, literally, "the result of * * * surgical treatment" rendered by the VA. Respondent presumably disavows that interpretation because it is exceedingly unlikely that Congress intended Section 1151 to provide disability benefits under such circumstances to a veteran whose original medical problem was unrelated to his military service. That conclusion, however, calls for employment of some limiting doctrine of legal causation.

For purposes of the necessary legal causation analysis, the VA divides adverse medical outcomes into two categories: (1) contemplated or reasonably foreseeable consequences, and (2) consequences arising from an "accident"—*i.e.*, those that were not reasonably foreseeable. 38 C.F.R. 3.358(c)(3); see note 4, *supra*.[11]. With respect to the first category, the Secretary has concluded that Congress did not intend to provide compensation when medical care is properly administered. A patient would, indeed, normally assume the risk of such foreseeable consequences of careful treatment by giving informed consent to treatment in the first place.[12] The

[11] In addition, the statute itself specifically precludes recovery where adverse consequences arise out of the claimant's own willful misconduct. 38 U.S.C. 1151 (Supp. IV 1992); 38 C.F.R. 3.358(c)(5).

[12] Failure to obtain informed consent before undertaking a medical procedure may itself constitute a failure to "properly administe[r]" care for purposes of the regulations. See 38 U.S.C. 7331 (Supp. IV 1992); 38 C.F.R. 17.34.

regulation therefore permits recovery only if a claimant can show "carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of the VA. 38 C.F.R. 3.358(c)(3). By contrast, the Secretary has concluded that unforeseeable medical "accidents" are sufficiently similar to medical malpractice to fall within the intended scope of the statute, whether or not caused by negligence.

The Secretary's approach is consistent with common experience, which teaches that "[w]henever an individual submits to surgical intervention, there are certain ill effects which may flow therefrom even though the operation is performed with the greatest possible degree of skill and precaution and no one is at fault," and that such ill effects "are contemplated risks which are anticipated as happening in a certain percentage of surgical procedures and considered the normal hazards of surgery." V.A. Gen. Coun. Op. 2-78, at 5 (1978) (J.A. 22). The Secretary's view that the statute requires legal causation is also consistent with the common law of medical malpractice, which has always provided the background for Congress's enactment, reenactment and periodic amendment of what is now Section 1151.

The no-fault standard advocated by respondent and the court of appeals, on the other hand, departs sharply from common-law principles of recovery for adverse medical outcomes. See, *e.g.*, *Ewing* v. *Goode*, 78 F. 442, 443 (C.C.S.D. Ohio 1897) (Taft, J.) ("A physician is not a warrantor of cures."); App., *infra*,

26a-28a;[13] compare *Urie* v. *Thompson*, 337 U.S. at 182. Adoption by Congress in 1924 of so radical a doctrine should not be presumed in the absence of absolutely clear evidence of congressional intent. See, *e.g.*, *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1879); N. Singer, *Sutherland Statutory Construction* §§ 50.01-50.05, 61.01-61.06 (5th ed. 1992). The court of appeals thought it persuasive (Pet. App. 17a) that the statute and legislative history provided no affirmative evidence that Congress intended to require claimants under what became Section 1151 to bear the "complex and difficult burden" of proving fault or accident. The court should instead have sought affirmative evidence that Congress intended to depart from the common-law norm and to relieve claimants of any burden of proof of fault—even a burden that is in fact less onerous than that routinely borne by common-law malpractice plaintiffs. See, *e.g.*, App., *infra*, 27a, 29a.

C. The court of appeals viewed the Secretary's fault-or-accident requirement as the imposition, without statutory mandate, of a new condition for liability, rather than as a reasonable interpretation of the statute's requirement that a claimant have

[13] Because it is particularly useful for purposes of this case, we have reprinted in the Appendix to this brief a memorandum from the VA's Solicitor to the Administrator dated October 24, 1935. App., *infra*, 11a-29a. Written in connection with the interpretation of the 1934 successor to Section 213 (discussed below), the memorandum discusses in some detail the early history of Section 213's interpretation by the VA. We have provided a copy of the original memorandum (which is quoted at page 27 of the Brief in Opposition) to respondent's counsel.

sustained an "injury * * * as the result of" VA care. See, *e.g.*, Pet. App. 8a. As discussed above, however, the statutory language is not so clear that it can be applied without interpretation. And, as we describe below, for more than 60 years the VA has interpreted Section 1151 and its precursors to require that a veteran show something more than the occurrence of a contemplated or reasonably foreseeable result of proper medical treatment in order to become entitled to benefits. The VA's interpretation of Section 1151 is a reasonable one that is not precluded by the "plain language" of the statute. See, *e.g.*, *National R.R. Passenger Corp.*, 112 S. Ct. at 1402 ("Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context."); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292-293 (1988) (opinion of Kennedy, J.); *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 980-981 (1986). In these circumstances, the Secretary's reasonable and longstanding interpretation must control, and the court of appeals erred in substituting its own interpretation for that of the Secretary. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984); *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932).

II. THE HISTORY OF THE STATUTE'S ENACTMENT, REENACTMENT, AND LONGSTANDING CONSISTENT APPLICATION SUPPORTS THE SECRETARY'S INTERPRETATION OF CONGRESSIONAL INTENT

Even taken by itself, therefore, the statutory language is not sufficiently unambiguous to justify the court of appeals' rejection of the Secretary's

longstanding interpretation. That conclusion is emphatically reenforced when the statute is viewed in the context of its legislative and regulatory history. See, *e.g.*, *Chevron*, 467 U.S. at 843 n.9 (directing use of "traditional tools of statutory construction" in determining whether intent of statute is clear); *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 614 (1991) (finding no ambiguity only after reviewing both text and legislative history); *Davis* v. *United States*, 495 U.S. 472, 481-485 (1990); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437-439 (1986). That history, discussed below, shows that it is extremely doubtful that Congress intended, through what is now Section 1151, to enact a no-fault compensation scheme for all adverse outcomes of VA medical treatment. The issue should therefore be resolved in accordance with the Secretary's reasonable and longstanding construction of the statute.

A. The Background Of The Statute's Original Enactment Suggests A Fault Requirement

Section 1151's first precursor was enacted in 1924 as Section 213 of the World War Veterans' Act, ch. 320, 43 Stat. 623 (*reprinted at* pages 6-7, *supra*). That Act was intended in part to respond to experience gained in the first years of operation of the Veterans' Bureau, which had been established in 1921 to consolidate the administration of compensation, insurance and medical benefits previously handled by separate federal agencies. See S. Rep. No. 397, 68th Cong., 1st Sess. 1 (1924); Act of Aug. 9, 1921, ch. 57, Tit. I, 42 Stat. 147 (establishing Veterans' Bureau).

A central figure in the enactment—and the subsequent interpretation—of the 1924 Act was General

Frank Hines, who served as Director of the Veterans' Bureau from 1923 until 1945. During the extensive congressional review of the Bureau's early operations that preceded the 1924 Act, General Hines provided comments and recommendations on the numerous suggestions for improvement made by veterans' organizations. In particular, Hines endorsed a proposal that compensation should be available to veterans disabled through accidents occurring in the course of veterans' vocational training, and added that the same principle should be extended to "the hazards of medical and surgical treatment." *World War Veterans' Legislation: Hearings on Proposed Legislation (As Recommended by the Director of the United States Veterans' Bureau and American Legion, Disabled American Veterans and Veterans of Foreign Wars) Before the House Comm. on World War Veterans' Legislation*, 68th Cong., 1st Sess. 122-123 (1924) [*House Hearings*] (*quoted at* Pet. App. 12a-13a); see also *Investigation of Veterans' Bureau: Hearings Before the Senate Select Comm. on Investigation of Veterans' Bureau*, 67th Cong., 4th Sess. 1529 (1923) [*Select Comm. Hearings*]. In late 1923 and early 1924, General Hines consolidated his recommendations and submitted them to Congress. He recommended both that VA medical facilities should be made available to all honorably discharged veterans (rather than only to those whose medical problems were service-connected), and that compensation should be authorized not only for veterans injured "during and because of training," but also for those who were hospitalized under VA auspices and injured "as the result of accident or negligence of

treatment or unskillfulness." See, *e.g.*, *House Hearings* 113.

From the outset, then, as the court of appeals recognized (Pet. App. 10a), General Hines presented his proposal as one dealing with compensation in cases of "accident or negligence * * * or unskillfulness." *House Hearings* 113. Our review of materials from this period indicates that the sort of medical treatment cases that primarily concerned General Hines, veterans' organizations and Congress were ones in which the law at that time permitted no compensation despite a showing of fault on the part of the government. See, *e.g.*, *Select Comm. Hearings* 1514-1567; 65 Cong. Rec. 9849 (1924) (veteran blinded by VA nurse who instilled wrong substance in his eye required to pay for own glass eye); 21 V.A. Gen. Coun. Op. 2822-A (1922) (death following anesthesia for tooth extraction not compensable even if facts showed malpractice because original dental condition was not service-connected); 28 V.A. Gen. Coun. Op. 1059 (1924) (disability caused by treatment for disease originally arising from veteran's misconduct not compensable, even if facts showed VA fault); 28 V.A. Gen. Coun. Op. 1309 (1924) (veteran who died after being given chemical developer instead of barium as part of diagnostic procedure denied compensation because underlying stomach ailment was determined to be non-service-connected); see also 59 V.A. Gen. Coun. Op. 458 (1929) (citing barium case and others as motivation for recommendation to adopt Section 213).[14]

[14] Copies of opinions of the VA's General Counsel or Solicitor from this period are available through the VA law library. Because the Court of Veterans Appeals first raised the issue of Section 3.358(c)(3)'s validity *sua sponte* at appellate level (see note 5, *supra*), there was no reason or opportunity to develop a record at the administrative level on the issue now before the Court. For the convenience of the Court, we will lodge with the Clerk (and provide to respondent's counsel) photocopies of opinions cited in our briefs but not reprinted in the Appendix hereto. In addition, the VA will make original materials available for review by respondent's counsel at his request.

Moreover, perhaps because the 1924 Act was also the first to extend to veterans the benefit of medical treatment for conditions that were not service-connected, see World War Veterans' Act, 1924, ch. 320, § 202(10), 43 Stat. 620-621, the legislative history contains no discussion of the different considerations that might apply to claims arising out of treatment rendered for non-service-connected conditions, on the one hand, and to service-connected conditions (or diagnostic procedures to determine the existence of a service connection), on the other.[15] Certainly the history reflects no debate of the sort one might have expected if Congress had thought it was enacting, in complete departure from the general standards of the common law, a broad program of no-fault insurance for all adverse consequences of treatment for

[15] In 1925, Section 213 was amended specifically to include injuries incurred by veterans as a result of having submitted to diagnostic examinations. Act of Mar. 4, 1925, ch. 553, § 11, 43 Stat. 1308. The House report on the proposed amendment states that "[w]hen section 213 was originally written * * * it was intended that these cases should be covered but through some inadvertence the language was not sufficiently broad to take in these cases." H.R. Rep. No. 1518, 68th Cong., 2d Sess. 7-8 (1925). The legislative history of the amendment does not otherwise discuss the intended scope of Section 213.

veterans' non-service-connected ailments. And it is unlikely, to say the least, that the VA could have had any such result in mind when it estimated that the proposed addition of compensation for training and hospitalization mishaps, along with three other new provisions, was "not considered on a whole as involving a material increase in cost." H.R. Rep. No. 763, 68th Cong., 1st Sess. 14 (1924).

Nonetheless, as the court of appeals observed (Pet. App. 10a-13a), parts of the 1924 legislative history suggest that Congress may have contemplated compensation for disabilities caused by medical treatment even where "the doctor does the best he can * * * without neglect * * * [and] [w]ith the best medical advice." *Id.* at 11a (emphasis omitted) (quoting testimony of General Hines). Thus, as we acknowledged in our petition (at 13), it is difficult to draw any confident conclusion about the intended scope of Section 213 on the basis of the pre-enactment legislative history alone.[16]

B. The VA Contemporaneously Interpreted The 1924 Statute To Require A Showing Of Fault Or Accident

The early history of Section 213 strongly suggests that it was not implemented as a broad no-fault insurance provision. Thus, in January, 1926, General Hines appeared before a House Committee and provided statistics showing that Section 213 accounted for only seven out of the 49,204 awards made up to that

[16] See *House Hearings* 113-115, 122-123, 259-261, 272-273; *Veterans' Bureau Codification Act: Hearings on S. 2257 Before the Subcomm. of the Senate Comm. on Finance*, 68th Cong., 1st Sess. 13, 102-103, 124, 130 (1924).

time under various provisions of the 1924 Act. *World War Veterans' Legislation: Hearings on H.R. 4474 Before the House Comm. on World War Veterans' Legislation*, 69th Cong., 1st Sess. 8 (1926). Nonetheless, the scope of Section 213 occasioned discussion within the VA during the agency's first years of experience in administering the new statute.

Within two weeks of the enactment of the 1924 Act, the VA's Medical Director indicated in a memorandum to Director Hines that

> [t]he provisions of Section 213 are clear enough except that the Medical Division will assume that it is not intended to comprehend the natural progress of an injury or disease within the meaning of this section. That is, it is presumed that additional disability or death within the meaning of Section 213 would logically be based upon *some fault or error on the part of the Bureau.*

Memorandum of June 19, 1924, from Medical Director to the Director, *quoted at* App., *infra*, 14a-15a (emphasis added). Despite the Medical Director's statement, it appears that at least some early cases were in fact adjudicated by VA field offices on a no-fault basis. See App., *infra*, 15a. The Medical Director raised this issue with the Director and the General Counsel early in 1926, in part suggesting that final review of such claims should be centralized so as to prevent what it viewed as improper awards. *Ibid.* In response, the General Counsel clarified that in his opinion

> it was clearly the legislative intent to afford relief to those persons who were lawfully hospitalized

> who, as a result of such hospitalization, incurred other disabilities *through malpractice, misfeasance or malfeasance of Bureau employees.*

36 V.A. Gen. Coun. Op. 511, 511 (1926) (emphasis added), *quoted at* App., *infra*, 17a. Similarly, in an opinion rendered the following month to the manager of a regional VA office, the General Counsel considered the case of a veteran who underwent an emergency appendectomy and subsequently complained of a hernia and abdominal adhesions. 37 V.A. Gen. Coun. Op. 775 (1926). The General Counsel affirmed that the circumstances of the hospitalization could properly give rise to liability, and returned the case to the local office for further factual determinations:

> It is not believed that Section 213 of the Act as amended contemplates that conditions which might ordinarily result from an operation properly performed, *where there is no malpractice, misfeasance or malfeasance on the part of Bureau employees*, should be held to be compensable. However, as above stated, the question presented is primarily one of fact essentially of a medical nature, and is therefore not one for the determination of this office. The question should be determined in light of the rule above stated.

Id. at 776 (emphasis added).

Shortly after the issuance of these opinions—and within two years after the initial enactment of the statute—General Hines issued the first regulation interpreting Section 213. See VA Regulation No. 137 (June 11, 1926) (*reprinted at* App., *infra*, 1a-2a). Section 7701 of that regulation provided that

compensation would not be paid "for the ordinary residuals of disease or injury following accepted medical treatment," but would be paid if "additional disease or injury is the result of examination or treatment, *improperly given.*" App., *infra*, 1a (emphasis added). Shortly thereafter, General Hines promulgated Regulation No. 157 (Sept. 15, 1926) (*reprinted at* App., *infra*, 2a), amending Section 7701 to make clear that compensation would be paid "where there is satisfactory evidence of *malpractice, malfeasance, or misfeasance* on the part of the [VA]." App., *infra*, 2a (emphasis added). That regulation in turn was superseded in early 1927 by Regulation No. 167 (Feb. 21, 1927) (*reprinted at* App., *infra*, 3a-6a), Section 7701(B)(4) of which replaced the "malpractice" language with the formulation that the "usual after results of approved medical care and treatment properly administered" would not entitle a patient to compensation. App., *infra*, 5a; see also *id.* at 5a-6a (death benefits). In 1930 the regulation was reissued, without relevant change, as VA Regulations & Procedure §§ R-1120 through R-1122 (1930), *reprinted at* App., *infra*, 6a-10a.

Contrary to the court of appeals' understanding (Pet. App. 13a), in applying Regulation No. 167 (which employed the most liberal verbal standard of the early regulations) the VA did require claimants to show fault or accident in order to recover—although, then as now, a showing of "fault" for these purposes did not necessarily require proof of negligence rising to the level of malpractice. See App., *infra*, 21a-24a, 27a; 50 V.A. Gen. Coun. Op. 439, 440 (1928); 65 V.A. Gen. Coun. Op. 429, 431 (1930) ("the benefits provided by Section 213 * * * may be awarded in this case, if the

disability causing the death proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, etc., in furnishing the treatment, as distinguished from the usual after results of approved medical care and treatment properly administered"). In 1930 the Comptroller General expressed the same interpretation of the statute. See 9 Comp. Gen. 515, 516 (1930) ("plain intent" of Section 213 was to grant compensation in cases involving accident or fault).[17] Thus, the court of

[17] During the same period, the Attorney General issued two opinions interpreting Section 213's causation requirement in cases involving disabilities arising out of training rather than medical care. The first opinion (35 Op. Att'y Gen. 76 (1926)) considered three cases: a trainee killed in a car-train accident while returning with his instructor from an official training excursion; another killed by a car while commuting on his bicycle from his training site to his prescribed lodgings; and a third killed by the accidental discharge of a gun while on the premises of his training employer for purposes connected with the training. *Id.* at 77. The opinion stressed the statute's requirement that an injury have occurred "as the result of training," and contrasted that language with the more liberal language of workers' compensation statutes ("arising out of or in the course of the employment" or "while in the performance of duty") and of the general provision for benefits for veterans' service-connected injuries ("injury suffered or disease contracted in the Military or Naval service"). *Id.* at 78-79. It concluded that in none of the three cases had death been the proximate result of VA training within the meaning of the statute. *Id.* at 79-81. The second opinion (36 Op. Att'y Gen. 61 (1929)) softened somewhat the contrast drawn between the proximate causation requirements imposed by Section 213 and the requirements of general workers' compensation laws, and concluded that a veteran hurt by a snapping tree limb while in a car driven by his VA counselor at his prospective job site was injured "as a result of" his training for purposes of Section 213.

appeals erred in discounting the VA's construction of the statute at issue here on the ground that it was not adopted or enforced contemporaneously with enactment of the provision's original precursor. See Pet. App. 19a.

C. Congress Adopted The VA's Settled Construction When It Reenacted The Statute In 1934

The VA's interpretation of Section 213 was therefore well-established by the time that Congress repealed that Section, along with numerous other benefits provisions, as part of the Economy Act of 1933. Act of Mar. 20, 1933, ch. 3, Tit. I, § 17, 48 Stat. 11. In 1934, Congress enacted a successor provision—codified at 38 U.S.C. 501a (1952)—in substantially the same terms as the statute repealed in 1933. Act of Mar. 28, 1934, ch. 102, Tit. III, § 31, 48 Stat. 526. Congress is ordinarily presumed to be aware of established administrative and judicial interpretations of statutes that it reenacts, amends, or adapts for other purposes, and is further presumed to adopt such interpretations when it makes no relevant changes in the statutory language. *E.g.*, *Young* v. *Community Nutrition Inst.*, 476 U.S. at 983; *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *NLRB*

36 Op. Att'y Gen. at 63-64. Both opinions focus on the need for proximate or "legal" (as well as factual) causation in order to bring an injured veteran within the purposes, and therefore the scope, of Section 213. They are thus consistent with the VA's interpretation of the same Section as applied to disabilities arising out of medical treatment. See also 38 C.F.R. 3.358(c)(6) (requirements for establishing proximate cause in vocational rehabilitation context); 26 V.A. Sol. Op. 343 (1936) (differentiating vocational training and medical cases for these purposes).

v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). In this case, the grounds for those presumptions are strong.

The relevant congressional committees have always paid close attention to the administration of veterans' benefits. In 1930, for example, Congress effectively overruled a number of interpretations of the veterans' laws rendered by the Comptroller General, by removing the VA from the Comptroller's jurisdiction and providing that the VA Director's decisions would be conclusive as to questions of both fact and law. Act of July 3, 1930, ch. 849, § 1, 46 Stat. 991. The extensive consideration and passage of that provision suggest an intimate congressional familiarity with the administration of the veterans' laws, and a high degree of confidence in the correctness of their interpretation by the VA. See, *e.g.*, *To Amend the World War Veterans' Act, 1924: Hearings on H.R. 13174 Before the Senate Comm. on Finance*, 71st. Cong., 2d Sess. (1930); *To Amend the World War Veterans' Act, 1924: Hearings on H.R. 10381 Before a Subcomm. of the Senate Comm. on Finance*, 71st Cong., 2d Sess. (1930); S. Rep. No. 885, 71st Cong., 2d Sess. (1930); H.R. Rep. No. 874, 71st Cong., 2d Sess, (1930). Moreover, in 1930-1931 the House Committee on Invalid Pensions, which had jurisdiction over veterans' benefits issues, specifically undertook to study the existing benefits structure.[18] Similarly, in

[18] A preliminary report for the Committee's members, compiled by the Chairman, indicates the existence of serious concerns about any overly generous construction of Section 213. Thus, the report specifically criticized that Section for providing veterans with a right to compensation for the "ill-effects of * * * treatment" for non-service-connected conditions, in circumstances where "ordinary citizens could collect damages under such conditions only through expensive litigation and by producing proof, satisfactory to a court, of malpractice or malfeasance on a physician's part." House Comm. on Invalid Pensions, *A Study of Veterans' Relief: A Tentative Print of Papers Submitted for the Consideration of the Committee*, 71st Cong., 3d Sess. 107 (1931); see also *id.* at III (Chairman's Foreword), 164-165. While the language of that report could be read to assume a no-fault interpretation of Section 213, the primary contrast drawn by the study is between the relatively informal, inexpensive, and generous provisions of Section 213 and the expense and difficulty of civil malpractice litigation. That contrast is dramatic — even more dramatic, perhaps, in 1930 than today—even if the veteran must make the sort of showing of fault (short of common-law malpractice, see App., *infra*, 27a) or "accident" required by the VA, both then and now, in its administration of the statute. In any event, it is clear that in 1931 a key congressional committee was well aware of Section 213 and its application to veterans with non-service-connected conditions.

1931 the Senate directed that the VA compile all federal laws relating to veterans. S. Res. 412, 71st Cong., 3d Sess. (1931) (see 74 Cong. Rec. 2736 (1931)). The compilation included a discussion of Section 213, including references to the VA's regulations, the Comptroller General's 1930 opinion restating the fault-or-accident standard, and various VA decisions under the statute. S. Doc. No. 131, 72d Cong., 1st Sess. § 476, at 146 (1932).[19] Information relating to the VA's construction of Section 213 was therefore before

[19] A 1937 supplement to the 1932 compilation included an updated statutory citation, references to and quotations from the current regulations, and references to VA decisions rendered in the interim. VA, *Supplement I (July 21, 1932, to January 1, 1937) to Federal Laws Relating to Veterans of Wars of the United States (Annotated)* § 476.1, at 110 (1937).

Congress during its consideration of veterans' benefits legislation in the ensuing three years.

The Economy Act of 1933, passed in the midst of the Great Depression, repealed all veterans' benefits provisions, substituting a new and much less generous system. See generally 38 U.S.C. 701-723 (1934); Veterans Reg. Nos. 1-12(b), set out in note following 38 U.S.C. 723 (1934). The following year, Congress relented in part and reenacted a number of the repealed provisions, including Section 213. The legislative history of that reenactment is especially informative on the issue of fault.

As the court of appeals noted (Pet. App. 15a), the Senator who introduced the amendment restoring the benefits formerly provided under Section 213 described his proposal as covering cases where "a veteran is disabled by reason of *mistreatment* on the part of a Government agent, *as in a case of malpractice by a Government surgeon*." 78 Cong. Rec. 3289 (1934) (emphasis added) (statement of Senator Steiwer). In a portion of his statement not quoted by the court, Senator Steiwer added that "[t]here are only a limited number affected by this amendment—I think it is 65—who have suffered at the hands of [VA] physicians. They were swept off all the rolls by the Economy Act. We seek by this amendment to put that little group back where they can be dealt with generously by their Government." *Id.* at 3290. See also *Independent Offices Appropriation Bill for 1935: Hearings Before the Subcomm. of the Senate Comm. on Appropriations*, 73d Cong., 2d Sess. 117 (1934) (statement of Senator Reed). Senator Steiwer presumably relied on cost estimates provided by the VA, which indicated that the proposed reenactment

would affect 62 cases then on the rolls, at a total first-year additional cost of $25,700.[20] See 78 Cong. Rec. 3497 (1934) (Table). Those very small estimates of the scope of statutory coverage surely "brought home to the legislature" (*Thompson* v. *Clifford*, 408 F.2d 154, 164 (D.C. Cir. 1968)) the limited scope of the VA's prior administrative practice.

The 1934 Congress that enacted what became 38 U.S.C. 501a (1934) thus did so against the backdrop of an administratively well-established fault-or-accident requirement, and the Senator sponsoring the legislation stated his belief that Congress was accepting responsibility for a small group of patients injured through mistreatment or malpractice at the hands of government agents. It also acted in the midst of a nationwide economic depression.[21] Compare *FDIC* v.

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[20] Approximately $310,000 in 1993 dollars. In the year ending June 30, 1933, the VA reported admission of 66,332 World War I veterans to the VA's own hospitals for treatment of non-service-connected disabilities. Administrator of Veterans' Affairs Ann. Rep. 41 (1933).

[21] See Administrator of Veterans' Affairs Ann. Rep. 1-2 (1933) (describing background of the Economy Act):

> Faced with widespread distress among all classes of citizens and continuing general economic depression, predictions of prior years that our system of veterans' relief with its ever-widening scope and increasing rate of expenditure would require review and subsequent modification were fulfilled.
>
> * * * * *
>
> * * * With the * * * mounting costs of veterans' relief and * * * the universal experience of lean times and distress, * * * attacks upon the pension practices of our Government became increasingly substantial and vocal. These attacks * * * were * * * essentially against recog-

Philadelphia Gear Corp., 476 U.S. at 432-433 (construing Federal Deposit Insurance Act in light of its Depression origins). Given the economic crisis that precipitated Section 213's repeal by the Economy Act, the prior administrative practice, and the representation made to Congress that Senator Steiwer's amendment would restore benefits to only a "little group" of wronged veterans, it seems completely improbable that Congress intended in 1934 to enact, suddenly, a broad and costly scheme of no-fault insurance against all adverse medical outcomes—particularly one that would cover veterans whose medical problems were not service-connected.

D. The Post-1934 History Of The Statute Confirms The Validity Of The Secretary's Long-standing Construction

As the court of appeals acknowledged (Pet. App. 16a), the VA's construction of the governing statute

nizing an obligation on the part of the Government toward those veterans who, though serving, were discharged from that service without disability. * * *

* * * [T]he President and the Congress, * * * in the face of a major national emergency, found it necessary for the protection of our credit to make certain curtailments in governmental expenditures involving not only veterans' relief but other activities of the Government. * * *

* * * In our desire to aid veterans in the past, it was frankly admitted that we probably had gone too far, and that there was not that marked distinction regarding benefits paid to veterans with combat and service disabilities as against benefits flowing to those who undoubtedly were in need of help but, nevertheless, who did not claim their disabilities were due to service.

to require some showing of fault or accident as a predicate for recovery was explicitly reconfirmed in August, 1934, shortly after the enactment of 38 U.S.C. 501a. See VA Administrator's Decision No. 255, 1 Admin. Dec. V.A. 321, 323 (1934); App., *infra*, 24a, 28a. The VA has consistently maintained the same interpretation from that time through its current embodiment in 38 C.F.R. 3.358(c)(3).[22]

Congress has taken action with regard to what is now Section 1151 several times since 1934. In 1940 Congress enacted a provision that extended the same coverage to all veterans submitting to examinations in connection with benefits claims.[23] See 38 U.S.C. 501a-1 (1940). In 1943 Congress enacted provisions for vocational rehabilitation of disabled veterans of the Second World War, and included language substantially similar to that in Section 501a, conferring benefits for injuries suffered as a result of such training.[24] See 38 U.S.C. 739 note (1946) (setting forth Veterans Reg. No. 1(a), Part VII, ¶ 4). Given Congress's close attention to veterans' benefits legislation, it is safe to assume that it had full knowledge of the VA's construction of Section 501a when it expanded the effective scope of the provision on these occasions.

In 1955 President Eisenhower appointed a special commission, chaired by General Omar Bradley, "to

[22] The predecessor to the current regulation was promulgated by the VA in 1936 and was first published in the Code of Federal Regulations in 1939. See 38 C.F.R. 2.1123(c) (1939). The regulation was promulgated in substantially its current form in 1961. 26 Fed. Reg. 1590-1591 (1961).

[23] Act of Oct. 17, 1940, ch. 893, § 12, 54 Stat. 1197. See S. Rep. No. 2198, 76th Cong., 3d Sess. 12 (1940).

[24] Act of Mar. 24, 1943, ch. 22, § 2, 57 Stat. 44.

make a comprehensive survey and appraisal of the structure, scope, and administration of the laws * * * providing pension, compensation, and related nonmedical benefits to veterans and their dependents." Exec. Order No. 10,588, § 2, 3 C.F.R. 236 (1954-1958 comp.). In describing the benefits conferred by Section 501a and related provisions, the Commission's staff specifically noted that compensation was not payable "for the after-results of approved medical care properly administered, in the absence of a showing" of fault or accident. Staff of President's Comm'n on Veterans' Pensions, 84th Cong., 2d Sess., *A Report on Veterans' Benefits in the United States: Compensation for Service-Connected Disabilities* 22 (Comm. Print. 1956). In 1957 and 1958, in the wake of the Commission's report, many veterans' benefits provisions, including Sections 501a and 501a-1, were repealed, revised, compiled, and reenacted in a comprehensive new codification.[25] No substantive change whatever was made to the te ms of what had been Section 501a and became 38 U.S.C. 351 (1958).

In 1962 Congress once again acted with respect to the statute at issue, amending what was then Section 351 to remove a two-year period of limitations on claims and to provide a specific offset for amounts recovered under the Federal Tort Claims Act on account of otherwise compensable injuries; it also enacted a provision setting effective dates for certain awards under Section 351.[26] Congress made further

[25] Veterans' Benefits Act of 1957, Pub. L. No. 85-56, §§ 351 (reenactment), 2202(132) (repeal), 71 Stat. 102, 168; Act of Sept. 2, 1958, Pub. L. No. 85-857, § 1, 72 Stat. 1124.

[26] Act of Oct. 15, 1962, Pub. L. No. 87-825, §§ 1 (enacting 38 U.S.C. 3010(c)), 3, 76 Stat. 948, 950. See H.R. Rep. No. 2123, 87th Cong., 2d Sess. (1962); S. Rep. No. 2042, 87th Cong., 2d Sess. (1962).

technical amendments to the statute in 1969, 1976, 1984, and 1991, the last of which also renumbered Section 351 as the current Section 1151.[27]

Despite this repeated, and often substantive, congressional attention to the provision at issue in this case, there is absolutely no evidence of any legislative dissatisfaction with the fault-or-accident requirement that has been explicitly set out in the VA's regulations since at least 1936. See note 22, *supra*. Thus, while it is generally true, as the court of appeals remarked (Pet. App. 19a-20a), that until 1988 only Congress could alter the VA's regulatory interpretations of the statutes it was charged to administer,[28] the absence of judicial review does not in

[27] Act of June 11, 1969, Pub. L. No. 91-24, § 3, 83 Stat. 33; Veterans Disability Compensation and Survivor Benefits Act of 1976, Pub. L. No. 94-433, § 404(19), 90 Stat. 1379; Veterans' Compensation and Program Improvements Amendments of 1984, Pub. L. No. 98-223, § 213(1), 98 Stat. 46; Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, §§ 4(a)(1), 5(a), 105 Stat. 403, 406 (1991).

[28] Although 38 U.S.C. 511 (Supp. IV 1992) (formerly 38 U.S.C. 211(a) (1988)) has long precluded district court review of VA benefit determinations in most individual cases, even before 1988 courts reviewed challenges to VA regulations in certain special circumstances. See, *e.g.*, *Kirkhuff* v. *Nimmo*, 683 F.2d 544, 546-548 (D.C. Cir. 1982) (citing *Evergreen State College* v. *Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Maryland* v. *Cleland*, 621 F.2d 98 (4th Cir. 1980); *Merged Area X (Education)* v. *Cleland*, 604 F.2d 1075 (8th Cir. 1979)). Courts also allowed challenges to the VA's general authority to promulgate regulations, see, *e.g.*, *Wayne State Univ.* v. *Cleland*, 590 F.2d 627 (6th Cir. 1978), and permitted review of VA benefit decisions in certain situations where the VA sought to

the least suggest any lack of authoritativeness in the VA's longstanding administrative construction. On the contrary, in light of Congress's frequent and close attention to veterans' benefits issues, one may presume with more than ordinary confidence that any significant inadequacy in the agency's construction would have been brought to Congress's attention, either by veterans themselves or by the many well-organized and sophisticated groups that represent them.[29] The courts should certainly *not* presume, in

recover funds already disbursed, see *Greenwood* v. *United States*, 858 F.2d 1056 (5th Cir. 1988). This Court has also permitted constitutional challenges to statutes governing the award of veterans' benefits. *Johnson* v. *Robison*, 415 U.S. 361 (1974).

[29] The elimination of the claims limitations period in 1962, for example, removed a significant restriction on the availability of benefits that had been in existence since the initial enactment of Section 213 in 1924. The change was supported by "[t]he four major veterans organizations." See, *e.g.*, S. Rep. No. 2042, *supra*, at 3. It is difficult to believe that in the course of considering that amendment Congress was not aware of the substantive standard applied by the VA in awarding benefits, or that the supporting veterans' organizations would not have taken the opportunity to protest if they had felt that the VA's fault-or-accident standard represented an unjustified departure from the statutory mandate. Similarly, we note that in 1953, during hearings concerning eligibility for care in VA hospitals, the National Director of Claims of the Disabled Veterans of America described for the subcommittee, accurately and without any suggestion of disapproval, the VA's interpretation of the statute as it applied to both vocational training and medical care, adding that "Service connection [established] in this manner permits the veteran full compensation rights as a protection against added disability because of training conditions or faulty medical care." *Entitlement and Eligibility of Veterans for Hospital Care and Outpatient Dental Treatment:*

the absence of affirmative evidence, that Congress intended, in 1934 or at any time thereafter, to adopt an interpretation that both differed sharply from the prevailing administrative interpretation, and would have had a dramatic financial impact on the federal budget.[30] Cf. *Lorillard* v. *Pons*, 434 U.S. at 580-581; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. at 274-275.

Hearings Before the Subcomm. on Hospitals of the House Comm. on Veterans' Affairs, 83d Cong., 1st Sess. 1924, 1932 (1953).

[30] The court of appeals relied on the lack of judicial review of VA regulations prior to 1988 as a reason to discount the longevity of the regulation at issue here in determining the deference due it from the courts. Pet. App. 19a-20a. As we point out in the text, however, quite the opposite is true. In any event, while there is no question that the court of appeals should subject the Secretary's regulations to conscientious review, there should also be no question that those regulations are entitled to at least the same degree of deference that guides and limits review of the regulations of other administrative agencies. Any misapprehension on this point takes on added significance because the court below has exclusive jurisdiction over challenges to the validity of the VA's regulations, 38 U.S.C. 7292(c) (Supp. IV 1992), so that in a single decision it can sweep aside longstanding administrative practice in a way that can be corrected only by this Court or by Congress. The Court should thus make clear that the VA's longstanding regulations are entitled to at least the same deference accorded similar regulations of other agencies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

1. VA Regulation No. 137, promulgated June 11, 1926, provided in pertinent part as follows:

> Sec. 7700. In accordance with the provisions of section 213, World War veterans' act, 1924, as amended, compensation is payable where any beneficiary suffers or has suffered an injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him under the vocational rehabilitation act, as amended, the war risk insurance act, as amended, or the World War veterans' act, as amended, or as a result of having submitted to examination under authority of section 303 of the war risk insurance act or section 203 of the World War veterans' act, as amended, and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to, or the death of such beneficiary.
>
> Sec. 7701. Compensation under the provisions of section 7700 will not be paid for the ordinary residuals of disease or injury following accepted medical treatment nor for the continuation of the original disability where improvement can not be effected by approved medical or surgical treatment. If an additional disease or injury is the result of examination or treatment, improperly given, compensation will be paid to the full extent of such additional disease or injury.
>
> Sec. 7702. Claims and rating boards in regional offices will make recommendatory ratings on cases coming under the provisions of section 213

of the World War veterans' act, 1924, as amended. These ratings will be forwarded together with the case file to central office for review and final rating by the rating section, awards division. The final rating and the case file will be returned to the proper regional office, and action based thereon will be taken in the field.

2. VA Regulation No. 157, promulgated September 15, 1926, modified Section 7701 of Regulation No. 137 to read in pertinent part as follows:

Sec. 7701. Compensation under the provisions of section 7700 will not be paid for any period prior to July 7, 1924. * * * Compensation will not be paid for the usual after results of approved medical or surgical treatment. When improvement of a disease or injury does not result after approved medical or surgical treatment, compensation will continue to be paid for the disability persisting from such original disease or injury, if it is service connected. But compensation will not be paid under like circumstances for persistence of disability from an original disease or injury in cases falling under section 202(10) of the World War veterans' act, 1924, as amended [authorizing medical treatment for non-service-connected conditions]. If an additional disease or injury is the result of examination or treatment, compensation will be paid to the full extent of the disability from such additional disease or injury, where there is satisfactory evidence of malpractice, malfeasance, or misfeasance on the part of the United States Veterans' Bureau.

3. VA Regulation No. 167, promulgated February 21, 1927, canceled and superseded Regulations Nos. 137 and 157 and provided in pertinent part as follows:

Sec. 7700. In accordance with the provisions of section 213, World War veterans' act, 1924, as amended, compensation is payable where any beneficiary suffers or has suffered any injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him under the vocational rehabilitation act, as amended, the war risk insurance act, as amended, or the World War veterans' act, 1924, as amended, or as a result of having submitted to examination under authority of section 303 of the war risk insurance act or section 203 of the World War veterans' act, as amended, and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to, or the death of such beneficiary.

Sec. 7701. Disability compensation under section 213, World War veterans' act, 1924, as amended, will be payable only when it is determined (1) that there is additional disability, and (2) that such additional disability resulted from an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination.

A. The determination that additional disability exists will be based upon a comparison of the beneficiary's physical condition immediately prior to the injury on which the claim for compensation under section 213 is based with his subsequent

physical condition resulting from such injury. It being deterimined that there is additional disability and that it is the result of an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination, then compensation will be payable only for such additional disability from the date of the receipt of the injury, in accordance with the terms of the schedule of disability ratings. This comparison will be made separately for each body part involved. As applied to medical or surgical treatment, the physical condition prior to the injury will be the condition which the specific medical or surgical treatment was designed to relieve; as applied to examinations, the physical condition prior to the injury will be the condition at time of beginning the physical examination as a result of which the injury was sustained.

B. In determining whether such additional disability results from an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment or examination, the following considerations will govern:

(1) It will be necessary to show that the additional disability is actually the result of such injury or an aggravation of an existing injury suffered as the result of training, or hospitalization, etc., and not merely coincidental therewith.

(2) Compensation under section 213 of the act will not be payable for the continuance or natural

progress of diseases or injuries for which the training, or hospitalization, etc., was authorized.

(3) The mere fact that aggravation occurred will not suffice to make the additional disability compensable in the absence of proof that it resulted from an injury or an aggravation of an existing injury suffered as the result of such training or hospitalization, etc.

(4) The usual after results of approved medical care and treatment properly administered will not be held as entitling to payment of compensation under section 213 of the act.

(5) Compensation under section 213 will not be payable for the residuals of medical care or treatment given outside of a Government hospital or clinic unless such medical care or treatment was specifically authorized under one of the several acts referred to in section 7700, or unless it is held to be adjunct treatment in connection with other treatment specifically authorized.

(6) The claimant's misconduct or failure to follow instructions in connection with training, hospitalization, medical or surgical treatment, or examination will bar him from the receipt of compensation under section 213, except in cases of incompetent claimants.

Sec. 7702. Death compensation under section 213, World War veterans' act, 1924, as amended, will be payable only when it is determined that the death is the result of an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination. If authoritative medi-

cal opinion is to the effect that death would have been the proximate result of the natural progress of the disease without the treatment given by the United States Veterans' Bureau, or, if medical or surgical treatment was resorted to solely as a last alternative in cases where death is imminent, and death results, such death will not be considered to have resulted from the treatment but from the disease or injury itself.

Sec. 7703. Claims and rating boards in the regional offices will make recommendatory ratings on cases other than death coming under the provisions of section 213 of the World War veterans' act, 1924, as amended. These ratings will be forwarded together with the case file to central office for review and final rating by the rating section, awards division. The final rating and the case file will be returned to the proper regional office and action based thereon will be taken by such office.

* * * * *

4. VA Regulations & Procedure §§ R-1120 through R-1122 (1930) superseded parts of Regulation No. 167, and provided in pertinent part as follows:

Disabilities resulting from training and treatment.

1120. In accordance with the provisions of section 213, World War veterans' act, 1924, as amended, compensation is payable where any beneficiary suffers or has suffered any injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him under the vocational

rehabilitation act, as amended, the war risk insurance act, as amended, or the World War veterans' act, 1924, as amended, or as a result of having submitted to examination under authority of section 303 of the war risk insurance act or section 203 of the World War veterans' act, as amended, and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to, or the death of such beneficiary.

What constitutes such disability.

1121. Disability compensation under section 213, World War veterans' act, 1924, as amended, will be payable only when it is determined (1) that there is additional disability, and (2) that such additional disability resulted from an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination.

(*a*) The determination that additional disability exists will be based upon a comparison of the beneficiary's physical condition immediately prior to the injury on which the claim for compensation under section 213 is based with his subsequent physical condition resulting from such injury. It being determined that there is additional disability and that it is the result of an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination, then compensation will be payable only for such additional disability from the date of the receipt of the injury, in accordance with the terms of the

schedule of disability ratings. This comparison will be made separately for each body part involved. As applied to medical or surgical treatment, the physical condition prior to the injury will be the condition which the specific medical or surgical treatment was designed to relieve; as applied to examinations, the physical condition prior to the injury will be the condition at time of beginning the physical examination as a result of which the injury was sustained.

(*b*) In determining whether such additional disability results from an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment or examination, the following considerations will govern:

1. It will be necessary to show that the additional disability is actually the result of such injury or an aggravation of an existing injury suffered as the result of training, or hospitalization, etc., and not merely coincidental therewith.

2. Compensation under section 213 of the act will not be payable for the continuance or natural progress of diseases or injuries for which the training, or hospitalization, etc., was authorized.

3. The mere fact that aggravation occurred will not suffice to make the additional disability compensable in the absence of proof that it resulted from an injury or an aggravation of an existing injury suffered as the result of such training, or hospitalization, etc.

4. The usual after results of approved medical care and treatment properly administered will not

be held as entitling to payment of compensation under section 213 of the act.

5. Compensation under section 213 will not be payable for the residuals of medical care or treatment given outside of a Government hospital or clinic unless such medical care or treatment was specifically authorized under one of the several acts referred to in section 7700, or unless it is held to be adjunct treatment in connection with other treatment specifically authorized.

6. The claimant's misconduct or failure to follow instructions in connection with training, hospitalization, medical or surgical treatment, or examination, will bar him from the receipt of compensation under section 213, except in cases of incompetent claimants.

Death compensation in disabilities resulting from training and treatment.

1122. Death compensation under section 213, World War veterans' act, 1924, as amended, will be payable only when it is determined that the death is the result of an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination. If authoritative medical opinion is to the effect that death would have been the proximate result of the natural progress of the disease without the treatment given by the United States Veterans' Bureau, or, if medical or surgical treatment was resorted to solely as a last alternative in cases where death is imminent, and death results, such death will not be con-

sidered to have resulted from the treatment but from the disease or injury itself.

APPENDIX B

VETERANS ADMINISTRATION

MEMORANDUM Date OCT 24 1935

From The Solicitor
To The Administrator
Subject Section 31, Public No. 141, 73d Congress

Reference is made to your memorandum of September 4, 1935, transmitting the attached memorandum from the Chairman, Board of Veterans' Appeals, dated September 3, 1935, calling your attention to an apparent conflict in the instructions and precedent decisions issued under and interpreting the provisions of Section 31, Public No. 141, 73d Congress, for "Recd. Confer with Maj Clark."

In his memorandum of September 3, 1935, the Chairman, Board of Veterans' Appeals, invites attention to that portion of R & P, R-1121, promulgated under Section 213 of the World War Veterans' Act, 1924, as amended, which reads:

> "(4) The usual after results of approved medical care and treatmen[illegible]roperly administered will not be held as entitling to payment of compensation under Section 213 of the Act".

and states that under this provision benefits were awarded under Section 213 of the World War Veterans' Act, for *unusual* results of surgical or medical treatment, while the usual after effects were not considered compensable. He also calls attention to Administrator's Decision No. 255, dated August 9, 1934, which holds that compensation under Section

31, Public No. 141, may not be paid "* * * unless it is shown that the death proximately resulted from accident, carelessness, negligence, lack of proper skill, error in judgment, malpractice, etc., on the part of the person, or persons, charged with a duty respecting his hospitalization or treatment". He states that this conclusion was based on a decision rendered by the Comptroller General of the United States on June 18, 1930, placing the same construction on Section 213 of the World War Veterans' Act, and that the decision of the Comptroller General was never promulgated for observation by rating agencies and consequently was not followed in the consideration of claims under Section 213 of the World War Veterans' Act. He also calls attention to Instruction No. 1, Section 31, Title III, Public No. 141, 73d Congress, which provides in part:

> "Initial determinations and adjudicative action in cases coming within the purview of section 31 will be in accordance with the principles and procedure outlined in "R & P R-1121, subparagraphs A and B thereof, 1122, 1123 and R & P 1332 and 1333 * * *"

and states:

> "* * * It will be observed that Instruction No. 1 provides that determinations under Section 31 shall be made in accordance with R & P, R-1121. This appears to be in conflict with Administrator's Decision No. 255 which held in substance that adjudications under Section 31 shall be made in accordance with the ruling laid down by the Comptroller General in his decision of June 18, 1930, which ruling is at variance with R & P, R-1121. Since Administrator's Decision No. 255 has not been rescinded or modified, instructions are desired as to whether the Board of Veterans' Appeals should follow the provisions of Instruction No. 1, Section 31, Public No. 141, and R & P, R-1121, or the provisions of Administrator's Decision No. 255, and the decision of the Comptroller General dated June 18, 1930.
>
> "It might be stated here that the conflict between Administrator's Decision No. 255 and Instruction No. 1, Section 31, Public No. 141, was called to your attention by the Assistant Administrator in charge of pensions in a memorandum dated June 22, 1935, in the case of Roy Bolton, C-360,794."

The inference contained in the memorandum from the Chairman, Board of Veterans' Appeals, dated September 3, 1935, is that Administrator's Decision No. 255 enunciates a new principle, i.e., one which was not followed in adjudications under Section 213, World War Veterans' Act, 1924, as amended, which was in effect revived by Section 31, Public No. 141.

As you no doubt recall, Section 213 was enacted on the recommendation of the Veterans' Bureau, and that in your testimony before the Committee on World War Veterans' Legislation, House of Representatives, which was considering the Bill subsequently enacted as the World War Veterans' Act, you stated in part as follows:

> "This is a new principle but one necessary to the very purpose for which the benefits of these Acts are accorded. * * *
>
> "So also in cases of hospitalization for compensable diseases or injuries, where without fault of

the patient, as the result of accident, or negligence or treatment or unskillfulness - things that must sometimes happen - the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof. The Government having undertaken to bestow a benefit has, in fact, inflicted a loss.

"It is, therefore, proposed with proper restrictions safeguarding against double payments of compensation, to authorize in such cases an increase of compensation commensurate with the increased disability." (Page 113, Hearings before the Committee on World War Veterans' Legislation, House of Representatives, 68th Congress, 1st Session).

While it is true that in a subsequent discussion reference was made to injuries as the result of operation without neglect, it is evident that the primary purpose of the Veterans' Bureau in recommending this legislation was to authorize the payment of compensation where additional disability results from "accident, or negligence or treatment or unskillfulness".

Shortly after the enactment of the World War Veterans' Act, the Medical Director addressed a memorandum to the then Director of the Veterans' Bureau, calling attention to the outstanding provisions of this new law and requesting an interpretation of these provisions. In this memorandum the following comment was made with reference to Section 213:

"The provisions of Section 213 are clear enough except that the Medical Division will assume that it is not intended to comprehend the natural

progress of an injury or disease within the meaning of this section. That is, it is presumed that additional disability or death within the meaning of Section 213 would logically be based upon some fault or error on the part of the Bureau. Such increased disability as is due to natural progress of a disease would be covered by increased compensation as ordinarily applied by the Bureau." (Memorandum from the Medical Director to the Director, dated June 19, 1924, re: "Interpretations of certain provisions of the Act, Public No. 242, 68th Congress["]).

Apparently the original adjudications under Section 213 were made on the premises that if additional disability resulted from training, hospitalization, or medical or surgical treatment other than through the veteran's own misconduct, compensation was payable under Section 213, irrespective of whether there was any fault on the part of the Bureau personnel. These adjudications were being made in the Field Offices when on March 11, 1926, the Medical Director addressed a memorandum to the then Director, suggesting that the procedure then in effect be amended so as to provide that the files of the cases involving payment under Section 213 be forwarded to Central Office for review and that the opinion of the Medical Service, Central Office, be the guide for the local Regional Offices in awarding compensation in such cases. In this memorandum the Medical Director stated that it was the view of his Office from the beginning that additional compensation would be awarded to such cases only where the additional disability resulted from fault or error on the part of the Bureau, that is, benefits under Section

213 should be awarded on the same ground that juries award their verdicts in malpractice suits. He stated further that where training, hospitalization, medical or surgical treatment or physical examination have been properly conducted, or more specifically, where a medical or surgical procedure which has been applied is one that is in accord with the consensus of medical opinion and the untoward result occurs which can not be attributed to fault or error on the part of a Bureau official, but merely represents the percentage of risk which necessarily inheres in any medical or surgical procedure, then it does not appear that the case is one which would resemble the basis of malpractice suits in Civil courts and is one which could not be compensated under the provisions of Section 213 of the World War Veterans' Act. As an example of a case which should not be compensated under Section 213, the Medical Director cited the following:

> "a retired major in the regular army who, under the provisions of Section 202(10) of the World War Veterans' Act, was admitted to Walter Reed Hospital, where he was operated upon for cancer of the rectum. He recovered from the operation, has gained in weight and health, and undoubtedly his life has been prolonged by the operation. This man concedes that the operation was skilfully performed, but nevertheless he claimed compensation under the provisions of Section 213 of the Act, because he has some slight loss of sphincter control. As a matter of fact, such slight residuals are a necessary result of what is necessarily a very sweeping operation. In this particular case, the Medical Service was of the opinion that the

> claimant had sustained no additional damage which would entitle him to compensation under the terms of Section 213."

The then General Counsel was requested to express his views on this subject, and in an opinion dated April 7, 1926, 36 G.C. 511, addressed to the Assistant Director, Coordination Service, made the following statement:

> "* * * The general theory back of Section 213 of the World War Veterans' Act was to afford relief to those who became injured while undergoing training, hospitalization, medical or surgical treatment, awarded under any of the Acts under which the Bureau operates where, of course, there was no "contributory fault on the part of the beneficiary. So long as a man was properly awarded hospitalization, he would be entitled to compensation for any injury resulting to him from such hospitalization irrespective of the nature of the disability for which he was originally hospitalized. In other words, it was clearly the legislative intent to afford relief to those persons who were lawfully hospitalized who, as a result of such hospitalization, incurred other disabilities *through malpractice, misfeasance or malfeasance of Bureau employees.* * * * It should not, for instance, be applied to a case where a patient is hospitalized with a disability which, according to medical knowledge, is about to be fatal and in which an operation is attempted as a last resort, and which results in death without the misfeasance or malfeasance of the hospital authorities. It was, however, intended to apply to a case where the patient has been lawfully

hospitalized and in the course of his treatment is injured through the *neglect* of the Bureau authorities, as through the administration of a dose of poison instead of medicine by a careless attendant. * * *" (Underscoring supplied).

As a result of this exchange of memoranda the first regulation relative to compensation awards under Section 213 of the World War Veterans' Act, 1924, as amended, was promulgated on June 11, 1926 (Veterans' Bureau Regulation No. 137). This regulation provided that compensation will be paid for the full extent of additional disease or injury which results from "examination or treatment, improperly given". (See 7701, V.B. Regulation No. 137). On September 15, 1926 this section of the regulation was amended so as to authorize the payment of compensation if an additional disease or injury is the result of examination or treatment "where there is satisfactory evidence of malpractice, malfeasance, or misfeasance on the part of the U.S. Veterans' Bureau", (V.B. Regulation No. 157).

Under date of November 11, 1926, Captain Watson B. Miller protested against the provision in the regulation requiring a showing of "malpractice, malfeasance or misfeasance on the part of the United States Veterans' Bureau", contending that this regulation was more restrictive than the law upon which it was predicated.

In a memorandum dated December 7, 1926, the then General Counsel advised you that:

> "* * * The language of the regulation is such that if literally followed it may bring about results more restrictive than the language of the statute warrants. At the time the Regulation was issued,

> however, it was felt that the language should be strictly drawn, as prior thereto "the statute itself was being applied indiscriminately.
>
> "Actual experience has demonstrated that through literal application of the Regulation hardship has been worked in meritorious cases. It is the opinion of this Office that the wording of the Regulation should now be changed. It is suggested therefore that a conference be called with representatives of this Office, the Medical Director, and Coordination Service present for the purpose of redrafting the Regulation."

This suggestion was approved and a conference was held, as a result of which the regulations on this subject were again amended by Regulation No. 167, Section 7701 of which provides:

> "Disability compensation under Section 213, World War Veterans' Act, 1924, as amended, will be payable only when it is determined (1) that there is additional disability, and (2) that such additional disability resulted from an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination.
>
> "A. The determination that additional disability exists will be based upon a comparison of the beneficiary's physical condition immediately prior to the injury on which the claim for compensation under Section 213 is based with his subsequent physical condition resulting from such injury. It being determined that there is additional disability and that it is the result of an injury or an aggravation of an existing injury suffered as the

result of training, hospitalization, medical or surgical treatment, or examination, then compensation will be payable only for such additional disability from the date of the receipt of the injury, in accordance with the terms of the Schedule of Disability Ratings. This comparison will be made separately for each body part involved. As applied to medical or surgical treatment, the physical condition prior to the injury will be the condition which the specific medical or surgical treatment was designed to relieve; as applied to examinations, the physical condition prior to the injury will be the condition at time of beginning the physical examination as a result of which the injury was sustained.

"B. In determining whether such additional disability results from an injury or an aggravation of an existing injury suffered as the result of training, hospitalization, medical or surgical treatment or examination, the following considerations will govern:

"1. It will be necessary to show that the additional disability is actually the result of such injury or an aggravation of an existing injury suffered as the result of training, or hospitalization, etc., and not merely coincidental therewith.

"2. Compensation under Section 213 of the Act will not be payable for the continuance or natural progress of diseases or injuries for which the training, or hospitalization, etc., was authorized.

"3. The mere fact that aggravation occurred will not suffice to make the additional disability compensable in the absence of proof that it resulted from an injury or an aggravation of an existing injury suffered as the result of such training, or hospitalization, etc.

"4. The usual after results of approved medical care and treatment properly administered will not be held as entitling to payment of compensation under Section 213 of the Act.

"5. Compensation under Section 213 will not be payable for the residuals of medical care or treatment given outside of a government hospital or clinic unless such medical care or treatment was specifically authorized under one of the several acts referred to in Section 7700, or unless it is held to be adjunct treatment in connection with other treatment specifically authorized.

"6. The claimant's misconduct or failure to follow instructions in connection with training, hospitalization, medical or surgical treatment, or examination will bar him from the receipt of compensation under Section 213, except in cases of incompetent claimants."
(This section is now incorporated into R & P, as Paragraph R-1121).

While the language of the regulation quoted above might afford some basis for assuming that compensation would be payable for a disability resulting from the unusual after results of approved medical care and treatment properly administered, in the absence of fault on the part of Veterans' Administration employ-

ees such an assumption can not be justified when the language is considered in the light of the opinions rendered subsequent to the promulgation of Veterans Bureau Regulation No. 167.

In an opinion dated March 10, 1927, in the case of Thomas B. Bowser, C-1,171,781, the then General Counsel in response to an inquiry from the Director as to whether there was authority to authorize compensation because of increased disability which the veteran suffered as a result of hospitalization, stated:

> "Taking into consideration all the facts in this case, I am of the opinion that if you find the claimant's present condition is the result of the action of the Bureau in removing this man from the hospital before a sufficient time had elapsed following the operation, and I recommend that you so find, compensation for his present disability will be payable under Section 213."

It will be noted that in the Bowser case the opinion was predicated on the fact that the Bureau employees were at fault in removing the man from the hospital before a sufficient time had elapsed following the operation.

n an opinion dated February 27, 1928, 50 G.C. 439, in the case of Frank McKeown, C-1,082,875, the following statement was made:

> "* * * It is apparent from the facts in this case that this veteran by reason of his hospitalization was unnecessarily placed in a position of peculiar danger and allowed to remain there, *evidently through the fault of authorities in charge of the hospital.* It is also apparent that there was a causative connection between this claimant's

> hospitalization and the injury suffered. Therefore, it is the opinion of this Service that a permanent rating should be given for this disability, as a matter of record, even though it will not affect the amount of compensation now being paid. * * *" (Underscoring supplied).

It will be noted that here again the conclusion is predicated on the fact that there was fault on the part of the Bureau employees.

In a decision dated June 18, 1930, (9 Comp. Gen. 515) the Comptroller General stated:

> "The plain intent of section 213 of the statute, amended, as above quoted, by the act of March 4, 1925, 43 Statute 1308, was to afford veterans some measure of compensation in those cases in which the disability arises through accident, carelessness, negligence, lack of proper skill, error in judgment, etc., on the part of any person charged with a duty respecting the hospitalization, or medical or surgical treatment pursuant to an award under either of the acts therein mentioned. * * *"

In an opinion dated December 27, 1930, 65 G.C. 429, in the case of William L. Concannon, XC-418,789, the then General Counsel, after quoting Paragraph R-1121 of Regulations and Procedure, including subparagraph (B) 4 thereof, stated:

> "* * * it is the opinion of this Service that the benefits provided by Section 213 of the World War Veterans' Act, as amended, may be awarded in this case, if the disability causing the death *proximately resulted through carelessness, accident, negligence, lack of proper skill, error in*

judgment, etc., in furnishing the treatment, as distinguished from the usual after results of approved medical care and treatment properly administered and provided, of course, the other requirements of the Section have been met." (Underscoring supplied)

It will be noted from the foregoing that the decision of the Comptroller General is not in conflict with, but rather in conformity with the opinions of the then General Counsel to the effect that disabilities resulting from unusual after effects of *properly* administered care or treatment are not compensable in the absence of a showing that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, et cetera, and that the principle enunciated in Administrator's Decision No. 255 is not a new one, but is merely a restatement of the former conclusions.

In view of the foregoing, it is my opinion that the proper construction to be placed on R & P R-1121 (B) 4 is that neither the usual nor unusual after results of approved medical care and treatment properly administered will be held as entitling to payment of compensation under Section 213 of the Act or Section 31, Public No. 141, in the absence of a showing that the disability proximately resulted from accident, carelessness, negligence, lack of proper skill, error in judgment, malpractice, et cetera, on the part of the person or persons charged with a duty respecting hospitalization or treatment of the veteran.

The question as to whether compensation may be awarded in a case in which a rating granting service connection was rendered on the theory that the

regulations and precedents did not require a showing of accident, carelessness, negligence, lack of proper skill, error in judgment, et cetera, where the resultant condition was an unusual after result, so-called, was considered in connection with the case of Ramon J. Rodriguez, XC-661, 161.

In the Rodriguez case a rating was made in 1927 to the effect that the death was compensable under Section 213. In a memorandum dated December 10, 1934, the Medical Director stated that in his opinion the death of the veteran did not result from carelessness, negligence, lack of proper skill, or error in judgment, and that the death should not be considered as an accident in the sense that the immediate hospital environment or forces working therein, were responsible for the death. In view of this holding, I advised you under date of December 13, 1934, that the proposed retroactive payment of compensation under Section 213, World War Veterans' Act, 1924, as amended, and Paragraph 2, Section 20, Public No. 78, be denied. This recommendation was approved by you on December 14, 1934. In the memorandum of September 3, 1935, the Chairman, Board of Veterans' Appeals, states that the recommendation of Major Clark in the case of Roy Bolton, C-360,794, was predicated on an alleged conflict between Administrator's Decision No. 255 and Instruction No. 1, Section 30, Public No. 141, 73d Congress. In the Bolton case the veteran was operated on at the Facility Muskogee, Oklahoma, for discharging fistula in ano on February 24, 1932. The operation was performed under local anesthesia and at that time the fistula was dissected and the sphincter muscle was severed. He was discharged on March 25, 1932, with maximum benefit received from hospitalization. The

Assistant Administrator, Major Clark, recommended payment for the disability incurred as a result of this hospitalization on the theory that it was not *the usual after results* of approved medical care and treatment, citing in support thereof R & P R-1121 (B) 4. The case was studied by the Medical Director and the Consultants in Surgery and Gastroenterology at the Diagnostic Center, Washington, D.C. It was the opinion of the Consultants, which was concurred in by the Medical Director, that the disturbance of sphincter control is not the result of malpractice, accident, carelessness, negligence or lack of judgment and proper skill on the part of the operating Surgeon, but that the present rectal pathology is the result of the pathological process and the sequelae of properly performed operative therapy.

In a memorandum dated July 3, 1935, Assistant Administrator, Colonel Ijams, expressed the opinion that if cases of this kind are to be considered with justice from a medical standpoint, a distinction must be made between the result of acceptable practice and the result of malpractice, stating in part:

> "Many times the surgeon is confronted with the necessity of defacing and destroying tissue in an effort to save or prolong life. Frequently, in operations for malignancy of the rectum, it is necessary to destroy much tissue, including that of the sphincter, in order to reach invaded areas. Many times, as in the case under reference, it is necessary to divide the sphincter in whole, or in part, for the cure of fistula in ano and the results are the sequelae of properly performed operative therapy. Such results are not the 'usual' results of uncomplicated operation, nor are they the

> 'unusual' results of a well performed surgical procedure.
>
> "Surgery is attended by certain hazards which must be considered to be within the limits of good practice and our surgeons might as well discontinue operating as to deny this fact. To compensate beneficiaries for such hazards, which are willingly accepted by patients of surgeons in private practice, does not appear fair or just from the standpoint of medical practice, and does not in any way conform to the "civil laws with reference to malpractice. The interpretation of the law which the Assistant Administrator proposes amounts to a guarantee that the surgical operation will be successful in every way. Such a guarantee is opposed to medical ethics and is one which no reputable surgeon would offer. * * *"

In a memorandum addressed to Colonel Ijams under date of July 5, 1935, you advised him that you desired a more full discussion of the merits of the case rather than on the general question involved and:

> "It is not my understanding that the present law requires the claimant to go so far as to show malpractice. I can readily understand that even with full regard to the hazards of surgery, certain conditions may develop which would bring the case under the law, because of accident or otherwise, which bring about results that are not the ordinary or those normally expected."

I concur with your view that the law does not require the claimant to go so far as to show malpractice but, as indicated above, it is my opinion that there must be more than a mere showing that the disability resulted

from other than the usual after results of approved medical care and treatment properly administered. There must be a showing of accident, carelessness, negligence, lack of proper skill, error in judgment, et cetera, on the part of the person or persons charged with the duty respecting hospitalization or medical or surgical treatment.

In this connection I deem it not improper to point out that these restrictions are limited to those cases in which the veteran is, or was receiving medical care or treatment for a non service connected disability. If the veteran is, or was receiving medical care or treatment for a service connected disability, any disability proximately resulting from such treatment, be it the usual or unusual after results, is compensable in the same manner as is the service connected disability.

After a careful consideration of the entire matter, it is my recommendation that the Chairman, Board of Veterans' Appeals, be advised that the proper construction to be placed upon R & P R-1121 (B) 4, and Instruction No. 1, Section 31, Title III, Public No. 141, 73d Congress, is as indicated above, i.e., neither the usual nor the unusual after results of approved medical care and treatment properly administered will be held as entitling to payment of compensation under Section 213, World War Veterans' Act, or Section 31, Public No. 141, 73d Congress, in the absence of a showing that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, et cetera. Under such a construction there will be no conflict between Administrator's Decision No. 255 and Instruction No. 1, Section 31, supra.

In concluding this memorandum, I feel that the rating authorities should be instructed that in applying the rule laid down herein to an individual case a considerable degree of liberality should be exercised in evaluating the facts for the purpose of determining whether the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, et cetera. It is safe to assume that one surgeon will be quite hesitant in saying that another surgeon did not perform an operation properly or with due care unless the facts are such as to put the matter beyond peradventure of a doubt. Because of this fact any strict application to the rule above referred to might in many instances operate to defeat the purpose for which the section (Section 31, Public No. 141, 73d Congress) was enacted, whereas if the rule is liberally construed in individual cases, and the veteran is given the benefit of any doubt in determining whether the disability proximately resulted from fault on the part of the Veterans' Administration employees, the cases which were intended to be encompassed in the Act will be taken care of. If you approve this memorandum, further consideration should be accorded the Bolton case in the light of the principles here set forth.

/s/ James T. Brady
JAMES T. BRADY.

Att.
File att.

(9)

No. 93-1128

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
Petitioner

v.

FRED P. GARDNER,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

A federal statute initially enacted in 1924 as part of the "War Risk Insurance Act" provides disability compensation to veterans injured as a result of medical treatment administered by Department of Veterans Affairs personnel. The 1924 Congress intended to provide a worker's compensation-type benefit to veterans, without requiring the veteran to prove that the medical injury was caused by any fault on the part of VA personnel. Two years thereafter, however, the VA embarked on a 60-year course of promulgating regulations which variously required veterans to present evidence of some form of fault in the rendering of medical treatment as a predicate to compensation. No fault requirement is contained in the statute. The question in this case is whether the Court of Veterans Appeals and the Court of Appeals for the Federal Circuit were correct in striking down the current regulation containing a fault requirement because it is inconsistent with the contrary intent of Congress contained in the straightforward no-fault language of the statute.

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STATEMENT OF THE CASE

Fred P. Gardner, a veteran of the Korean conflict era, underwent surgery at a VA medical facility in June 1986 to relieve radiating back pain due to a herniated disc in the lumbar spine. While the Secretary is correct to state that the surgery was "successful in removing the herniated disc" (Brief for the United States at 8) [hereinafter Brief], Mr. Gardner suffered a serious injury during his surgery resulting in permanent neurological damage. Mr. Gardner has experienced progressive nerve damage and muscular wasting in the left leg, and he is now completely disabled. Today Mr. Gardner wears a leg brace, uses a cane, requires a wheelchair for hospital visits, and is disabled from employment.

Over two years after the surgery, Mr. Gardner filed a claim with the Waco, Texas, VA regional office [VARO] for disability compensation benefits under 38 U.S.C. § 1151 (Supp. IV 1992), which provides in pertinent part:

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of . . . medical or surgical treatment . . . and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to . . . the veteran, disability or death compensation under this chapter . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

There are two major disability benefit programs administered by the VA: service-connected disability compensation and non-service-connected disability pension. By operation of Section 1151, Mr. Gardner would have been eligible for service-connected disability compensation for this surgical injury in the form of a monthly payment, even though the surgical injury was not service-connected as incurred "in the line of duty." This is so because under Section 1151, benefits "shall be awarded in the same manner as if such disability . . . were service-connected."

Hence, these benefits are sometimes referred to as "quasi-service-connected benefits."

The rate of compensation—designed to offset the degree to which the disability impairs the ability to earn a living—is set by a schedule containing ten percentage grades of disability based on the seriousness of the injury, ranging from 0 percent to 100 percent. *See* 38 U.S.C. § 1155 (Supp. IV 1992).[1] For fiscal year 1991, the VA paid veterans and their dependents over $12.13 billion in compensation benefits and over $3.9 billion in pension benefits. Annual Report of the Secretary of Veteran Affairs, Fiscal Year 1991 at 115.

Mr. Gardner's claim was denied by the VARO in Waco, Texas. He then appealed *pro se* to the Board of Veterans' Appeals [BVA] in Washington, D.C., which also denied the claim. The regulation upon which the VARO and the BVA relied to deny benefits provides in pertinent part:

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

[1] The establishment of service connection even at the 0 percent level may also entitle a veteran to ancillary benefits such as public employment preferences, job retention rights, and basic VA health care. *See, e.g.*, 38 C.F.R. §§ 17.30-17.612 (1990). If service connection is established at a 50% level, a veteran is entitled to medical treatment for all conditions. 38 U.S.C. § 1710(a)(1)(D) (Supp. IV 1992).

38 C.F.R. § 3.358(c)(3) (1990). Neither the VARO nor the BVA was free to decide the claim contrary to the terms of the existing regulation; they are prohibited from doing so by statute. 38 U.S.C. § 7104(c) (Supp. IV 1992); 38 C.F.R. § 3.101 (1990). Mr. Gardner then appealed to the U.S. Court of Veterans Appeals [COVA] which has exclusive jurisdiction over BVA decisions. 38 U.S.C. § 7261 (Supp. IV 1992).[2]

COVA reversed the BVA denial of benefits in a unanimous three-judge opinion authored by Chief Judge

[2] The Secretary, makes two contentions in his brief to this Court regarding Mr. Gardner's claim before COVA that require comment. First, the Secretary contends that Mr. Gardner while acting *pro se* did not himself raise the issue which has generated this petition: that is, whether the fault requirement contained at 38 C.F.R. § 3.358(c)(3) impermissibly conflicts with the statutory mandate of 38 U.S.C. § 1151. (Brief at 10 n.5). To the contrary, recognizing the plain language of the legislative grant at issue in this case, Mr. Gardner without aid of counsel wrote to the BVA demanding service-connected benefits under the plain language of 38 U.S.C. § 1151. (Claimant-Appellee Appeal from the United States Court of Appeals, Appendix at 131-132) [hereinafter C.A. App.]. COVA later ordered supplemental briefing on this issue as a result of its ongoing efforts to be solicitous of *pro se* veterans, who comprise over 70% of the Court's docket.

Second, the Secretary states that the BVA secondarily denied Mr. Gardner's claim on the grounds that his condition was "not in any way related to the [surgery]." (Brief at 9). The Secretary goes on to assert that the Court of Veterans Appeals and the Federal Circuit, in upholding Mr. Gardner's claim, disregarded that factual finding. The fact is that neither court has authority to review purely factual determinations of the BVA. *See* 38 U.S.C. § 7261 and 38 U.S.C. § 7292(d)(2)(A), (B) (Supp. IV 1992). More significantly, however, VA counsel expressly conceded in argument before COVA that Mr. Gardner is totally and permanently disabled and that such disability was caused by the surgery. In particular, in a supplemental memorandum to COVA, the Secretary stated that "there is no dispute that such condition was caused by the surgery." Memorandum of the Secretary at 14.

Nebeker. At that stage in the litigation—and contrary to his position in this Court—the Secretary agreed that the statute plainly did not include an element of fault in its literal terms. (Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit, Appendix at 25a) [hereinafter Pet. App.]. Instead, the Secretary argued that giving full play to a literal reading of the statute would lead to a "ludicrous result" demonstrably at odds with the intent of Congress. *Id.* In support of this view, the Secretary asserted that the words of the statute—"injury resulting in additional disability"—would require compensation for *any* change in the veteran's condition resulting from surgery, such as a surgical scar or the amputation of a gangrenous limb. The Secretary believed that the VA's engrafted fault requirement was necessary to preclude this allegedly absurd outcome resulting from a literal application of the statute.

In rejecting this argument, COVA concluded there was insufficient evidence of any Congressional intent to limit compensation to instances of VA fault, as the Secretary had accomplished by regulation. COVA observed that the statute includes only two limitations on the granting of benefits: first, that the injury occurs "as a result of" medical treatment; and, second, that the injury must not be a "result of such veteran's willful misconduct." (Pet. App. at 27a). Reasoning from the structure of the statute, COVA concluded that Congress had considered the issue of VA fault and intentionally excluded it as an element from the statute. COVA found that this conclusion was not contradicted by any of the legislative history. In fact, the legislative history surrounding the 1924 enactment was as compatible with a no-fault system as with a fault system. (Pet. App. at 29a). Finally, COVA rejected the Secretary's plea for deference to his interpretation of the statute, since the statute was plain on its face. *Id.*

On appeal to the Court of Appeals for the Federal Circuit, another unanimous panel affirmed the invalidity of the Secretary's fault-based regulation in the face of yet a new argument by the Secretary in that court. There the Secretary argued for the first time that Section 1151 was ambiguous, in an effort to invoke the deferential standard afforded an agency's interpretation of an ambiguous statute required by this Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Secretary suggested that the words "as a result of" were unclear and justified the adoption of the VA regulation requiring proof of fault as a predicate to compensation. However, neither the Secretary nor his predecessor had ever in the 68-year history of the statute taken the position that the statute is ambiguous. On the contrary, VA General Counsel have repeatedly observed that the statute is quite clear, as we discuss below.

The Federal Circuit concluded that the language "as a result of" was not ambiguous and "mandates only a causation requirement" (Pet. App. at 7a), and affirmed the invalidity of the Secretary's fault-based regulation. The Federal Circuit recognized that fault and causation are fundamentally distinct concepts which Congress has routinely distinguished in other legislation. When read in its entirety, the statute makes clear that the preclusion of a fault element by Congress was both informed and intentional. (Pet. App. at 8a).

The Federal Circuit similarly found from a review of the legislative history that "Congress's paramount concern was to compensate veterans injured by VA medical treatment." (Pet. App. at 17a). The court found no indication that Congress intended to place upon the veteran the "complex burden of proving negligence" as a condition of compensation. *Id.* Regarding the Secretary's request for deference to his regulatory interpretation, the Federal Circuit concluded that Congress had left no

gap in the statutory mandate that would permit the exercise of discretion by the Secretary to impose a fault requirement in the compensation process. The court need not defer to the Secretary's asserted "long-standing" interpretation of the statute because that interpretation was not contemporaneous with the statute's enactment. Finally, the court observed that VA regulations should be subjected to "vigorous review" because such regulations were never subject to judicial scrutiny until the creation of the Court of Veterans Appeals in 1988:

> Until 1988 . . . the VA stood "in 'splendid isolation as the single federal administrative agency whose major functions [we]re explicitly insulated from judicial review. . . .'" Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations' unscrutinized and unscrutinizable existence, however, does not in itself form a basis for us to presume they are valid and therefore defer to them.

(Pet. App. at 20a) (citation omitted).

SUMMARY OF THE ARGUMENT

Section 1151 provides that a veteran injured as a result of VA medical treatment is entitled to compensation for that injury without having to prove fault of any kind. The language of the statute is plain and unambiguous, and a no-fault reading of the statute is consistent with the statutory provision as a whole and the overall statutory scheme of veterans benefits as enacted in 1924. Incorporating a fault element into that statute by regulation is contrary to the clearly stated intent of Congress in 1924. There is no justification for any reference to subsequent legislative history or to an asserted "long-standing" agency interpretation of Section 1151 based on contrived arguments by the Secretary that the statute is ambiguous. This is particularly true where the benefits of that statute must be liberally construed by the VA

in favor of the veteran and where the legislative history is consistent with the plain meaning found by the courts below.

The VA interpretation of Section 1151 is an unreasonable expression of the dictates of Congress and is entitled to no deference. The VA's own General Counsel in interpretative opinions on at least two occasions has acknowledged that the legislative history of Section 1151 affords little support for the VA regulation. Similarly, the General Counsel has repeatedly changed the fault-based regulation in substantive ways that are at odds with the VA's assertion that the regulation represents a consistent and "long-standing" interpretation of Section 1151. The General Counsel also has conceded in interpretive opinions that the history of the VA regulation of Section 1151 is a confusing maze of ambiguity and conflict which would not support a claim for judicial deference.

There is no reason for this Court to allow special deference to VA regulations. Until 1972, none of the VA's fault-based regulations pertaining to Section 1151 were the product of notice and comment rulemaking. Until 1988, none of the VA's regulations were reviewable by a court. Until 1989, none of the VA General Counsel's opinions interpreting Section 1151 and the VA regulations were published in the Federal Register. Indeed, none of the VA decisions applying this regulation in the past have ever been generally available to the public. In short, VA regulations and General Counsel opinions for over 64 years have constituted a secret body of law. The courts having exclusive jurisdiction over decisions of the Board of Veterans' Appeals, therefore, should employ a vigorous review of agency regulations because Congress has narrowly circumscribed the authority of the Secretary to promulgate only regulations that are "consistent with [the] laws." In any event, no standard of judicial deference to VA regulations would warrant reversal of the judgment of the Court of Appeals.

ARGUMENT

I. THE PLAIN MEANING OF SECTION 1151 PRECLUDES IMPOSITION OF A FAULT REQUIREMENT AS A PREDICATE FOR BENEFITS.

The Secretary argues that enactment of the VA's fault-based regulation involves a routine application of the tools of statutory construction because the statute is ambiguous. (Brief at 12). To reach that result the Secretary argues that the words "injury" and "as a result of" as used in the statute are ambiguous and require the fault-based regulation. The VA, however, has never asserted these arguments as support for the regulation in the 66 years that preceded this litigation. The Secretary is seeking deference to an interpretation which is actually a "post hoc rationalization of government lawyers" or an "inference[] derived from reading between the lines of an agency decision or excerpted from the brief of a government lawyer." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. ——, 112 S.Ct. 1394, 1405 (1992) (White, J., dissenting); *Motor Vehicle Mfrs. Assoc. of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983).[3] The VA has

[3] The Secretary implicitly suggests that this change in strategy was the product of the lack of "opportunity to develop a record at the administrative level on the issue now before the Court" rather than a late effort to obtain *Chevron*-type deference to the regulation. (Brief at 25 n.14). To that end, the Secretary has supplied the Court with certain VA General Counsel opinions and has advised that other opinions are "available through the VA law library." (Brief at 24 n.14). First, in BVA proceedings no such "administrative record" could have been made since a veteran may not challenge the validity of a VA regulation. 38 U.S.C. § 7104(c). Second, at COVA the Secretary did not present these authorities because his argument there was that the statute was plain on its face, but that literal application would lead to absurd results.

The general unavailability of these VA source materials, exhibited by the Secretary's own brief, explains why no deference is owed to the VA regulation based on these materials. In fact,

promulgated its fault-based regulations over the years not because the statute is ambiguous, but rather because the VA has chosen to respond to competing interests on an *ad hoc* yet inconsistent basis.[4]

A. The Language of the Statute

Far from being a "routine sort of statutory interpretation," the Secretary's regulation is directly contrary to an unambiguous statutory mandate that "would [not] warrant a different construction" or justify deference to an ill-conceived formulation of misguided agency policy. *National Organization for Women, Inc. v. Scheidler*, —— U.S. ——, 114 S.Ct. 798, 806 (1994). In Section 1151 Congress has stated that benefits "shall be awarded" where a veteran has suffered "an injury . . . as a result of medical or surgical treatment." Hence, as in *Conroy v. Aniskoff*, 507 U.S. ——, 113 S.Ct. 1562, 1564 (1993), "[t]he statutory command . . . is unambiguous, unequivocal, and unlimited" and thus not subject to contravention by the VA.[5] This analysis begins, as always,

the VA cannot locate some of the original source materials upon which the Secretary now relies. *See* note 9, *infra*.

[4] The VA's actions must be upheld, if at all, only on the basis articulated by the agency itself and not by its counsel in litigation. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947).

[5] *Conroy v. Aniskoff* involved the question of whether an Army officer was required to demonstrate prejudice to enjoy the benefits of certain tolling provisions, under the Soldiers and Sailors' Civil Relief Act, against the time in which to redeem real property sold for taxes. In that case, the Solicitor General appeared as *Amicus Curiae* and argued that the unambiguous statutory text rendered legislative history irrelevant. The Solicitor also argued that where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" Brief for the United States as *Amicus Curiae* at 6, 9-10, 21-22, *Conroy v. Aniskoff*, 507 U.S. ——, 113 S.Ct. 1562 (1993) (citations omitted). In that case, the Solicitor was correct to note that federal statutes granting benefits to veterans must be liberally construed pursuant

with the language of the statute itself. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. ——, 112 S.Ct. 2589, 2594 (1992), and the assumption that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. ——, 112 S.Ct. 1146, 1149 (1992).[9]

Ignoring the plain meaning of the statute entirely, the Secretary has focused on the words "injury" and "as a result of" to promote an argument that the statute is ambiguous. The Secretary's convoluted argument on these points, however, "has exceeded the scope of available ambiguity." *John Hancock Life Ins. v. Harris Bank*, 510 U.S. ——, 114 S.Ct. 517, 531 (1993). The Secretary's argument also ignores the rule of statutory construction that words are to be given their ordinary, common sense, and natural meaning. *FDIC v. Meyer*,

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to *King v. St. Vincent's Hospital*, 502 U.S. ——, 112 S.Ct. 570, 574 n.9 (1991).

[9] *See also Central Bank v. First Interstate Bank*, —— U.S. ——, 114 S.Ct. 1439 (1994) (private plaintiff may not maintain aiding and abetting suit under Securities and Exchange Act); *FDIC v. Meyer*, 510 U.S. ——, 114 S.Ct. 996 (1994) (no implied cause of action for savings and loan officer under the Fifth Amendment); *City of Chicago v. Environmental Defense Fund*, —— U.S. ——, 114 S.Ct. 1588, 1591 (1994) (statute does not contain exclusion sought by agency); *Fogerty v. Fantasy, Inc.*, 510 U.S. ——, 114 S.Ct. 1023 (1994) (attorneys fees available to prevailing party in copyright infringement action); *Keene Corp. v. United States*, 508 U.S. ——, 113 S.Ct. 2035 (1993) (Court will refrain from reading into a statute what Congress has left out); *Mertens v. Hewitt Associates*, 508 U.S. ——, 113 S.Ct. 2063 (1993) (non-fiduciaries not covered by ERISA); *Dept. of Treasury v. Fabe*, 508 U.S. ——, 113 S.Ct. 2202 (1993) (on remand) (state statute regarding priority of creditors not preempted); *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (witness attendance fee payable to prisoner); *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) (OMB may not countermand agency regulations under Paperwork Reduction Act); *Lowe v. SEC*, 472 U.S. 181, 206 (1985) (publisher of securities newsletter not an investment advisor under Act of 1940).

114 S.Ct. at 100; *Dole v. United Sheetworkers*, 494 U.S. at 35-36; *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985). The Secretary concedes that "injury" in its ordinary sense means "any 'hurt, damage or loss sustained.'" (Brief at 13). There is nothing about that definition which requires the Secretary to include a fault element in Section 1151 adjudications.

The simple and straightforward language of the statute is reinforced by the overall structure of the statutory scheme of veterans benefits. *See John Hancock Life Ins. v. Harris Bank*, 114 S.Ct. at 523; *Bethesda Hospital Ass'n v. Bowen*, 485 U.S. 399, 403-05 (1988). The structure of the statute itself presumes a no-fault basis in that compensation "shall be paid" for injury suffered "as a result of" four different circumstances: (1) hospitalization; (2) medical or surgical treatment; (3) the pursuit of a course of vocational rehabilitation; or (4) the conduct of a medical examination required by any provisions of Title 38. There are only two limitations to the mandatory grant of service-connected benefits under the statute, both of which deal only with causation. First, the injury or aggravation of an injury must occur "as a result of" one of the four circumstances enumerated. Second, benefits are not available to a veteran where the cause of the injury is "the result of such veteran's own willful misconduct." While a multiplicity of additional factors—including fault on the part of VA personnel or "accident" however defined—might be expected to operate in any of the four circumstances, none are mentioned in the statute as grounds for limiting the obligation of the Secretary to treat such injuries as service-connected. Nor is there an explicit or implicit grant of discretion to the Secretary to withhold service-connected benefits where the terms of the statute are met.

The courts below agreed that the omission of an element of fault in the statute was no oversight. The 1924 precursor of Section 1151, Section 213 of the World

War Veterans' Act, Pub. L. No. 68-242, 43 Stat. 607 (1924), was presented as a bill to amend the "War Risk Insurance" Act. *Hearings Before the House Comm. on World War Veterans' Legislation*, 68th Cong., 1st Sess. 113 (1924) [hereinafter 1924 Hearings]. Section 213 was clearly characterized at its inception as remedial legislation. *See* S. Rep. No. 397, 68th Cong., 1st Sess. 5 (1924). That the statute was part of an insurance program fortifies the observation of both courts below that Congress designed a no-fault scheme "given its experience in enacting legislation concerning both common law negligence and the no-fault approach to liability." (Pet. App. at 8a, 26a).

That Congress considered and rejected the concept of fault on the part of VA medical personnel is clear from the single exclusion of compensation benefits where the veteran is guilty of "willful misconduct." This demonstrates that the veteran is protected against even his own negligence, even though contributory negligence was a standard defense in fault-based systems in 1924. This no-fault approach is also consistent with both state and federal worker's compensation schemes. *See* 1A Larson, The Law of Workmen's Compensation § 2, at 1-5 (1952); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 904(b) (1986). Congress did not overlook a requirement of fault on the part of the VA where it carefully crafted such a modest exclusion to compensation based on the willful misconduct of the veteran. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

B. The Contextual Use of "Injury" and "As a Result of" In the Statute

The accepted meanings of the words "injury" and "as a result of," as these words are used in other statutory provisions of the VA scheme, are at odds with the Secretary's current gloss. For example, in General Counsel Precedent Opinion 86-90, which is binding within the VA system [38 C.F.R. § 14.507 (1990)], the General Counsel stated that the word "injury" as used in 38 U.S.C. § 101(24) of the Act was "to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him," citing *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1944). In that context the General Counsel, therefore, concluded that "injury" meant "harm resulting from some type of external trauma." VA Gen. Coun. Prec. Op. 86-90 at 10 (1990). The same analysis should be relied on here for interpretation of the word "injury" in Section 1151.

While the word "injury" is not defined by Congress anywhere in the VA statutory compensation scheme, the word is nevertheless used elsewhere in the statute in its common sense meaning to define other terms. The most telling use of the word "injury" by Congress occurs in the original Act of 1924 to define compensable disabilities as "wound[s]," "*injury*," and "disease." Pub. L. No. 68-242, § 202(9), (10), 43 Stat. 607, 620 (1924) (emphasis supplied); *see generally* S. Rep. No. 397, 68th Cong., 1st Sess. 3 (1924). The corresponding statute today now authorizes the VA to provide compensation for "any disability," 38 U.S.C. § 1710(a)(1)(B) through (F), (H) and (I) (Supp. IV 1992), which it defines as "a disease, *injury*, or other physical or mental defect." 38 U.S.C. § 1701(1) (Supp. IV 1992) (emphasis supplied). *See Kirkhuff v. Nimmo*, 683 F.2d 544, 548 (D.C. Cir. 1982). The word "injury" in its common sense meaning also serves the intent of Congress elsewhere in

the statute where it is used to define the term "aggravation": "A preexisting *injury* or disease will be considered to have been aggravated . . . where there is an increase in disability . . . ." 38 U.S.C. § 1153 (Supp. IV 1992) (emphasis supplied). Incorporating a fault element to the meaning of the word "injury" in light of its use throughout Title 38 would negate the entire purpose of the Act. The "normal rule" is that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986).

The parallel statutory provisions of Sections 1110 and 1131—governing entitlement to disability compensation for conditions arising out of wartime and peacetime service—use language nearly identical to Section 1151 yet do not require the veteran to prove fault on the part of the service department. Compensation entitlement is established under those sections as long as there is a simple temporal relationship between the incurrence of the disability and a period of active service. 38 U.S.C. § 105 (Supp. IV 1992). In this regard, Section 1110 provides a guarantee of compensation to active military personnel for "disability *resulting* from personal *injury* suffered or disease contracted in line of duty . . . during a period of war." 38 U.S.C. § 1110 (Supp. IV 1992) (emphasis supplied). Similarly, Section 1131 provides a guarantee of compensation for active military personnel for "disability *resulting* from personal *injury* suffered . . . during other than a period of war." 38 U.S.C. § 1131 (Supp. IV 1992) (emphasis supplied). Both Section 1110 and Section 1131 contain the assertedly ambiguous words "injury" and "resulting" which, according to the Secretary, offend the plain meaning of Section 1151. Yet under these statutes, a veteran who suffers a surgical injury for treatment of a service-connected condition receives compensation without proof of fault, as the Secretary concedes. (Brief at 8, n.3). *See* 38 C.F.R. § 3.310(a) (1990).

The outcome of the interplay of the Secretary's regulations—imposing a fault requirement on Mr. Gardner but not on those who receive treatment for service-connected injuries—is that a veteran who incurs a disability caused by medical treatment cannot obtain compensation unless the original disability for which care was sought is service-connected. In other words, a veteran identically situated —but for the fact that the disability for which he seeks treatment is not service-connected—may not receive service-connected compensation for the new disability caused by medical treatment, unless the veteran meets the complex burden of proving that some form of fault on the part of the VA caused the new disability.

Because it is rational and proper to treat these two cases alike, there is no reason to assume that Congress did not intend for both veterans to be compensated for the "bad result" of their medical care on a no-fault basis. That was the primary focus of Congress according to the courts below (Pet. App. at 26a), and such an intent on the part of Congress was certainly not "impossible" or clearly absurd. Nor is there any evidence of a contrary legislative intent to treat these classes differently. In his petition to this Court, the Secretary never addressed the absence of any evidence that Congress intended to treat the hospitalized veteran and the active duty person differently under identical circumstances. In his brief, however, the Secretary suggests that this distinction between the service-connected and non-service-connected origin of the condition which leads to hospital treatment is at the heart of the statute and requires a fault-based regulation in the case of veterans who seek medical treatment for non-service-connected disabilities. (Brief at 8, n.3 and 15, n.8). However, there is no authority—nor does the Secretary refer to any—which supports even an inference that Congress had this distinction in mind in 1924 or at any time in reenacting Section 1151 benefits in 1934.

On the contrary, in General Counsel Precedent Opinion 80-90 (1990), the Secretary's own General Counsel stated that Congress *did not* intend there to be a dis-

tinction between recipients of so-called "quasi-service-connected" benefits under Section 1151 and recipients of benefits under Sections 1110 and 1131. "If Congress had intended to preclude such payment, it would have expressed recognition of the inconsistency by specifically excluding such class of claimants." (Joint Appendix at 27) [hereinafter J.A.]. Section 1151 unambiguously provides that, should its predicate conditions be met, disability compensation "shall be awarded *in the same manner* as if such disability . . . were service-connected." 38 U.S.C. § 1151 (emphasis added). The Secretary may not change this outcome by regulation. *See Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 463 (1989).

C. The Overall No-Fault Scheme of VA Benefits Legislation

The fault requirement of the regulation is inconsistent with the entire policy of VA compensation shown in the enactments of Congress and recognized by decisions of COVA. The veteran is entitled to the benefit of the doubt in all proceedings. 38 U.S.C. § 5107(b) (Supp. IV 1992); 38 C.F.R. § 3.102 (1990); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). The VA is required to apply a broad and liberal interpretation of its rules. 38 C.F.R. § 3.303(a) (1990). The VA has a duty to assist the veteran in the investigation and presentation of his case before the VARO and the BVA. 38 U.S.C. § 5107(a) (Supp. IV 1992); *Murphy v. Derwinski*, 1 Vet. App. 78 (1990). Independent expert medical opinions are available to the veteran in some cases in order to support a claim involving complex medical issues. 38 U.S.C. § 5109 (Supp. IV 1992). Congress has also concluded that for certain medical conditions, the veteran is entitled to a presumption of service-connectedness in evaluating entitlement to compensation. 38 U.S.C. §§ 1112, 1116 (Supp. IV 1992). Imposing the complex burden of proving malpractice as a predicate for compensation is at odds with the entire VA system of benefits.

Consistent with this policy, this Court rejected a constitutional challenge to the then-existing $10 congressional limitation on attorneys fees for representation of veterans in the claims process. In *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), the VA argued in favor of the $10 limit based on the premise that Congress intended the benefit system to be non-adversarial, informal, and paternalistic. This Court described the benefits system as one in which lawyers were unnecessary because applying for benefits is a "relatively uncomplicated procedure." *Id.* at 330 (quoting S. Rep. No. 446, 97th Cong., 2d Sess. 25, 49-50 (1982)). Because the principal issues in the VA benefits system are primarily (1) the extent of disability, and (2) the disability's causal connection to service, this Court concluded that there is a low probability of error in the benefits process. *Id.* at 310, 326. Therefore, this Court concluded that to the extent the $10 cap on attorney's fees discouraged legal representation of veterans, that circumstance did not adversely affect the accuracy of the claims procedure. Particularly relevant to the issues in this case, this Court observed:

> [The] process is designed to function throughout with a high degree of informality and solicitude for the claimant. There is no statute of limitations, and a denial of benefits has no formal res judicata effect. . . . VA boards are instructed to read any submission in the light most favorable to the claimant.
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> *Simple* factual questions are capable of resolution in a *nonadversarial* context, and it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgments.

Id. at 311-12, 330 (citing 38 C.F.R. §§ 19.129, 19.124, 19.121 (1984)) (emphasis supplied). Finally, "the panel [that determines disability levels] is required by regulation 'to assist a claimant in developing the facts pertinent to

his claim.'" *Id.* at 310 (citing 38 C.F.R. § 3.103(a) (1984)). *See also* 38 U.S.C. § 5107(a). Such a duty is incompatible with a fault based system; indeed if fault were required under Section 1151, the VA would be obligated to help claimants establish the negligence of its own doctors and nurses.

The *Walters* decision makes clear that the Secretary's argument regarding the meaning of "injury" and "as a result of" is entirely inappropriate. The Secretary, in his brief at 15 n.8 and 17, attempts to incorporate into each of these terms a so-called "legal" definition to support the fault-based regulation. Such a component, with the concomitant complexities of tort law, would mandate legal representation throughout the claims process in contrast with *Walters*. Yet even with the enactment of the Veterans Judicial Review Act [VJRA] in 1988, Congress preserved the nonadversarial system, even though the attorney fee cap was eliminated. Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988), codified at 38 U.S.C. § 7251 *et seq.* (Supp. IV 1992). Under the VJRA, attorney's fees may only be awarded for representation of a veteran *after* the first final decision of the BVA. 38 U.S.C. § 5904(c)(1) (Supp. IV 1992). This provision ordinarily means that representation of the veteran would occur only before COVA, where the VA maintains that the relationship between the Secretary and the veteran becomes, for the first time, strictly adversarial. In the VJRA, Congress clearly intended that even this new system for attorney's fees should permit continuation of the prior practice of veterans being assisted by skilled veterans' service officers throughout the VA regional offices and through the initial BVA administrative process. *See* 134 Cong. Rec. S16,646 (1988) (statement of Sen. Cranston). "In providing for judicial review of veterans claims, it is not our intent to encourage litigation between veterans and the VA." 134 Cong. Rec. H10,343 (1988) (statement of Rep. Montgomery).

In this context, the Secretary opines that had Congress intended a no-fault system in 1924, there would have been legislative comment on the elimination of the fault requirement from common law concepts of negligence. The error in this analysis is that in 1924, the common law of sovereign immunity meant that *no one* could sue the government for malpractice. The Federal Tort Claims Act was not enacted until 1946. 28 U.S.C. §§ 1346(b), and 2671 *et seq.* (1982). Furthermore, Congress in 1924 could not have created only a malpractice-type system for veterans *sub silentio* where the enactment of the Federal Employees Liability Act in 1908 demonstrates that Congress knew expressly how to enact fault when it wanted to do so. *See* Federal Employers' Liability Act, 45 U.S.C. § 51 (1988). The FTCA, in contrast to Section 1151, focuses on fault and its procedures reflect this. For example, 28 U.S.C. § 2401(b) provides a two-year statute of limitations for FTCA claims. Such provisions, which relieve defendants of the burden of disproving fault once memories and evidence are lost, are common to fault-based systems. By contrast, Congress repealed Section 1151's two-year statute of limitations in 1962, because it had "resulted in some inequities"—that is, deprived some veterans injured in VA hospitals of disability payments. S. Rep. No. 2042, 87th Cong., 2d Sess., *reprinted in* 1962 U.S.C.C.A.N. 3260, 3268. Thus, the veterans' disability system rejects that the FTCA embraces: the procedural features of a fault-based system.

The absence of a fault requirement is not an anomaly, but an essential part of a benefits system of which Section 1151 is an integral part. In 1924, it would have been unreasonable for Congress to believe that a veteran—physically and sometimes mentally disabled—could establish fault where he was forbidden to pay an attorney more than $10 and was required to rely on the VA itself for his evidence of fault. This is the real background against which Congress created the World War Veterans Act.

Prior to 1924, a veteran treated for a service-connected disability could obtain benefits for any surgical injury that resulted, without proof of fault. With the 1924 Act, Congress simply put the veteran treated for a non-service-connected disability on a par with the veteran treated for a service-connected disability. Rather than incorporating a fault-based system, Congress simply expanded a no-fault compensation system. Because Congress simply expanded the VA's prior compensation scheme, it is hardly surprising that there was no mention made of any radical change in the common law, since no such radical change was intended.

D. The Legislative History of the Act

As both courts noted below, recourse to legislative history is not appropriate in light of the plain meaning of the statutory text, *Darby v. Cicneros*, 509 U.S. ——, 113 S.Ct. 2539, 2545 (1993). However, the pre-enactment legislative history of the 1924 Act actually supports the no-fault compensation scheme.[7] General Frank T. Hines, in recommending the legislation, stated:

> [I]n cases of hospitalization for compensable diseases or injuries, where without fault of the patient, as the result of accident or negligence of treatment or unskillfulness—*things that must sometimes happen*—the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof. The Government having undertaken to bestow a benefit, has, in fact, inflicted a loss.

1924 Hearings at 113 (emphasis supplied). In the following colloquy with members of Congress, General Hines stated:

[7] The Secretary grudgingly concedes that "it is difficult to draw any confident conclusion about the intended scope of Section 213 on the basis of the pre-enactment legislative history alone." (Brief at 26). Hence, the Secretary abandons any argument that the legislative history of the original enactment supports the fault-based regulation.

> [I]t seems to me manifestly unjust, that in good faith the man undergoes an operation, *the doctor does the best he can and without neglect* . . . [w]ith the best medical advice, and still at the end of a certain period we find the man has a greater disability than he originally started with, and we have no way of correcting in any measure that condition.

1924 Hearings at 114 (emphasis supplied). Lest there were any doubt of the intention of General Hines as sponsor of this legislation on behalf of the Veterans' Bureau, the record in the House contains a letter from General Hines in which he wrote:

> I concur in the principle that authority should exist for compensating the cases of disability due to the hazards of training upon the general theory and principle of the workmen's compensation act. I would extend the principle beyond this particular proposal to include also ratable disability *incurred without fault and due to the hazards of medical and surgical treatment.*

1924 Hearings at 122 (emphasis supplied).

The only countervailing legislative history upon which the Secretary has relied consists of comments, also made by General Hines, which make clear that the legislation would also provide compensation in the case of VA fault. (Brief at 23-24). Those comments, however, are entirely consistent with a no-fault compensation scheme, since benefits for fault are contemplated in a no-fault statute.[8] Certainly, this history does not manifest a

[8] In the absence of legislative history in 1924 supporting the fault-based interpretation of Section 1151, the Secretary offers to the Court four VA General Counsel opinions from 1922 to 1929 and suggests that "[o]ur review of materials from this period" indicates that Congress was concerned in 1924 only with medical cases where fault was involved. (Brief at 24). There is nothing in the Congressional materials to suggest this is true—or that fault cases were the only consideration of Congress. Moreover, in 59 VA Gen. Coun. Prec. Op. 458 (1929), upon which the Secre-

"clearly expressed legislative intent to the contrary" of the plain meaning of the statute that might warrant a different construction. *National Organization for Women v. Scheidler*, 114 S.Ct. at 806, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Had the Secretary ever truly found any ambiguity in the statute enacted by Congress, the Secretary would have been obligated to resolve that ambiguity in favor of the veteran "under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 112 S.Ct. at 574 n.9; *see also Conroy v. Aniskoff*, 113 S.Ct. at 1565-66; *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Indeed, in a similar context, as we indicated above, the Secretary has recognized and appropriately applied this precept to the benefit of veterans. *See* VA Gen. Coun. Prec. Op. 80-90 (1990), citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). There being no record of the Secretary ever having considered this presumption with respect to Section 1151, his litigation position that the statute is ambiguous is entitled to little credence.

II. THE SECRETARY'S CONSTRUCTION OF SECTION 1151 IS NOT ENTITLED TO ANY DEFERENCE.

No deference is due to administrative interpretations at odds with the plain language of the statute itself. *Dole v. United Steelworkers of America*, 494 U.S. at 42-43; *Public Employees Retirement System of Ohio v. Betts*,

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tary relies for the premise of this argument, benefits were awarded to a veteran under Section 213 of the 1924 Act *without* consideration of fault. More significantly, in that opinion the General Counsel stated, "The prime place to go for evidence of the intention of Congress is the statute, which, in this case, is quite without ambiguity, as far as this Service can discern." *Id.* at 458.

494 U.S. 158, 171 (1989). Policy arguments and broad notions of congressional intent, *see Mertens v. Hewitt Associates*, 113 S.Ct. at 2071, also cannot overcome the text and structure of a statute "except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it." *Central Bank v. Interstate Bank*, 114 S.Ct. at 1142 (quoting *Demarest v. Manspeaker*, 498 U.S. at 191). Nor is an agency entitled to deference to a history of inconsistent or ambiguous interpretations of a statute. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. at 2597; *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16-17 (1932). *See also EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991); *Southeastern Community College v. Davis*, 442 U.S. 377, 411-12 (1979); *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974).

In seeking deference to the VA interpretation of the statute, the Secretary weakly asserts that "[t]he early history . . . strongly suggests that it was not implemented as a broad no-fault insurance provision." (Brief at 26). On the contrary, the early history demonstrates exactly the opposite because in the first two years of implementation of the 1924 Act, VA field officers granted benefits irrespective of whether there was proof of fault, obviously relying on the plain language of the statute. *See* Memorandum of the Solicitor, October 24, 1935 (Brief for the United States, Appendix B at 15a) [hereinafter Brief App. B]. During that period, there was no contrary definitive statement of VA policy, either by regulation or by General Counsel opinion. Therefore, the contemporaneous evidence surrounding the 1924 Act—both in the legislative record as we indicate above and in the conduct of the VA—convincingly demonstrates a paramount concern to compensate veterans injured by VA medical treatment, irrespective of fault.

According to the Secretary, the impetus for departure from the plain language of the statute came in 1924 from the Medical Division of the VA which "presumed" that benefits under the statute would "logically" be based upon some "fault or error on the part of the Bureau." (Brief at 27). As no action apparently was taken in response to this position by the Medical Division, the Medical Director wrote again to the VA Director on March 11, 1926, seeking to limit the award of Section 213 benefits to "the same ground that juries award their verdict in malpractice suits." [9] (Brief App. B at 16a). Yet even that extreme view was not adopted by the VA when, on June 11, 1926, the first restrictive regulation relative to this compensation scheme was promulgated. Instead, Regulation No. 137 merely precluded recovery for conditions arising out of the natural progress of the disease or injury being treated and acknowledged that recovery was available for additional injury resulting from treatment "improperly given." (Brief for the United States, Appendix A at 1a) [hereinafter Brief App. A]. As the Federal Circuit observed, this regulation did not preclude benefits in the absence of proof of fault.[10]

Only three months later, Regulation No. 157 was promulgated which authorized compensation for "malpractice, malfeasance, or misfeasance"—which are undefined —but still did not limit compensation to those circum-

[9] The memorandum of the Medical Director from this time period cannot be located, according to counsel for the Secretary. Therefore, our only knowledge of its contents is gleaned from the VA Solicitor's brief summary in his Memorandum of October 24, 1935. (Brief App. B).

[10] Denial of compensation for the natural progress of the disease or injury, reflected in 38 C.F.R. § 3.358(b)(2) (1990), is not at issue in this case. That provision provides a conclusive answer to the Secretary's argument that under respondent's position compensation would be required for the amputation of a gangerous limb. Furthermore, there is no "injury" where the intended outcome of the surgical procedure—to save the veteran's life—is accomplished.

stances. This regulation spawned a complaint from a service officer that the regulation was "more restrictive than the law upon which it was predicated." (Brief App. B at 18a). The result of this complaint was yet another formulation, Regulation No. 167, the purpose of which was to liberalize the previous standard by providing benefits for all injuries other than those which were "the usual after results of approved medical care and treatment properly administered." (Brief App. A at 5a). Thus, within a space of eight months, the VA redefined its position three times by regulation. Accordingly, the Federal Circuit was correct to observe the lack of precision in this process and language, and further observed that "it does not appear that [under any of these regulations] the VA actually excluded disability claims where the veteran could not prove fault or accident." (Pet. App. at 14a). Proof of fault was not an absolute prerequisite until August 1934, after reenactment. (Pet. App. at 16a).

The Secretary cites for evidence of this early fault-based standard two adjudicatory opinions of the VA from 1928 and 1930, as well as the same Comptroller General opinion referenced by the Court of Appeals. (Brief at 29-30). *See* 9 Comp. Gen. 515 (1930) (J.A. at 6). While the Secretary cites these VA adjudications to suggest that the actual practice of the VA during that time period was to employ a fault-based methodology, those findings actually deal only with the casuation issue. 65 Op. VA Gen. Coun. 429 (1930); 50 Op. VA Gen. Coun. 439 (1928).[11] They are entirely consistent with opinions of the Attorney General of the United States, upon which

[11] For example, the claim of Frank McKeown deals with a veteran whose fingers were severed when they were slammed in a door. The claim of William Concannon deals with emergency dental care. Neither turns on the issue of fault. There is no other evidence cited by the Secretary in support of his claim that the VA actually required proof of fault prior to August 1934. The use of the term "accident" in those opinions is, of course, consistent with a no-fault system.

the Federal Circuit relied. *See* 36 Op. Att'y Gen. 61, 63 (1929); 35 Op. Att'y Gen. 76 (1926). (Pet. App. at 14a). These opinions make clear, as do the VA General Counsel opinions of the same era relied upon by the Secretary, that the primary issue in VA benefits analysis was whether the injury was caused by the VA activity. This is entirely consistent with the plain meaning of the words "as a result of" contained in the statute.

Rather than exhibiting a record of consistent agency interpretation of the statute, the VA record demonstrates confusing inconsistencies influenced by concerns that have nothing to do with the original intent of Congress, as can be gleaned from a cursory reading of the Memorandum of the Solicitor to the Administrator, October 24, 1935, set out in Appendix B of the Secretary's Brief. That memorandum—itself arising out of a conflict in interpretation between the Chairman of the Board of Veterans Affairs and the Administrator of the VA—recounts 11 years of administrative confusion and *ad hoc* regulation and concludes with the following statement which hardly constitutes a clear administrative policy of statutory interpretation: "[C]onsiderable degree of liberality should be exercised in evaluating the facts. . . . [I]f the rule is liberally construed in individual cases . . . the cases which were intended to be encompassed in the Act will be taken care of." (Brief App. B at 29a). This record also reflects intentional departures from—or at least ignorance of—the two opinions of the Attorney General of the United States from that time period. Both of those opinions are predicated upon fundamental principles of worker's compensation law, which are entirely consistent with the no-fault predicate of the 1924 Act.[12]

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[12] The Comptroller General Opinion upon which the Secretary relies actually awarded benefits without evidence of fault to a veteran who had developed dermatitis as a result of hospital x-rays. 9 Comp. Gen. 515 (1930) (J.A. at 6).

The history of the so-called "long-standing" fault-based interpretation of Section 1151 is also set forth in General Counsel Precedent Opinions 2-78 (1978) and 99-90 (1990) (J.A. at 11 and 30), which also depict an agonizing maze of ineffective efforts to define what is meant by "accident" in order to ameliorate the restrictive fault-based gloss placed on the statute by the VA. These two opinions demonstrate that even after the Solicitor's Memorandum of October 24, 1935, numerous additional efforts were made by regulation and precedent opinion to articulate the meaning of "accident." Yet the word "accident" appears nowhere in the Act. All of these efforts can be traced to a single comment by General Hines in the 1924 hearings which ultimately had no bearing on the actual language of the 1924 Act:

> [I]n cases of hospitalization for compensable diseases or injuries, where without fault of the patient, as the result of *accident* or negligence of treatment or unskillfulness—*things that must sometimes happen*—the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof.

1924 Hearings at 113 (emphasis supplied).

While it is apparent that General Hines was using the word "accident" to denote a no-fault outcome in contrast to negligence—as COVA observed in its decision (Pet. App. at 28a)—the subsequent interpretations given the term "accident" by the VA attempt to identify a category of cases somewhere between no-fault and negligence. Regulations Nos. 137, 157, and 167 are themselves examples of failed attempts to define this notion. Yet, in Precedent Opinion 99-90, the General Counsel acknowledged that the reference to "accident" in the Comptroller General decision reported at 9 Comp. Gen. 515 (1930), was actually "gratuitous and largely irrelevant *obiter dictum.*" (J.A. at 38). The Comptroller General's fault-based interpretation nevertheless was carried over in Ad-

ministrator's Decision No. 255 (1934), which first concluded that benefits were payable *only* when the injury arose through accident, carelessness, or negligence. *Id.*

This view was altered yet again in July of 1953 when the VA Solicitor explained that benefits were payable only if injury was caused by "accidental means." (J.A. at 39). There is no explanation in Precedent Opinion 2-78 as to what this modification meant in the context of Section 1151 benefits. It appears to be another *ad hoc* attempt to define "accident" in an acceptable fault-based sense. The regulation was modified yet again in 1961, when the General Counsel concluded that the new 1961 regulation accepted the "ordinary meaning of the word 'accident' [as] opposite that of 'negligence.'" (J.A. 39-40). It is again not clear that the 1961 regulation, however, was meant to deny compensation in no-fault circumstances: that is, "opposite that of negligence."

In the 1978 amendment to the regulation, generated by the General Counsel's expressed dissatisfaction with the 1961 interpretation, the concept of "accident" as opposite "negligence" was translated into a new definition of "accident" as "any unforeseen, untoward result." (J.A. at 40); 43 Fed. Reg. 51,015 (1978). In 1990, the General Counsel concluded that even that definition was too restrictive to "allow grants of benefits in certain cases we believe fall reasonably within the realm contemplated by Congress when creating this benefit." VA Gen. Coun. Prec. Op. 99-90 (1990) (J.A. at 40).[13]

[13] It is interesting to note that in suport of a recent failed legislative amendment to Section 1151 which re-defines "accident" to prevent "unfair" results in adjudicating Section 1151 benefit claims, the Secretary opined that the decision in this case would cost $5 billion in the next five years. 138 Cong. Rec. S4040 (March 20, 1992). When the Secretary filed his petition to this Court that figure shrunk to $1 billion. (Pet. at 19). However, no mention is now made whatsoever in the Secretary's main brief about this potential financial impact. That is because the medical information upon which those figures were premised does not support that inference. *See* Brief for *Amicus Curiae* Paralyzed Veterans of America *et al.*, at 18-22. Furthermore, the VA General Counsel has recently concluded that the decision in this case—should it be upheld—would not be retroactive. *See* VA Gen. Coun. Prec. Op. 9-94 (1994). One of the asserted predicates for the grant of *certiorari* in this case, therefore, has been abandoned by the VA.

Therefore, rather than demonstrating a long-standing agency interpretation of a statute, VA history reveals no less than eleven different definitions or interpretations of the word "accident" even though that word appears nowhere in the statute. Furthermore, the VA does not currently believe that the regulation as it exists today accurately reflects Congressional intent. The problem is aptly summarized by the General Counsel in the 1978 Precedent Opinion: "Some of the difficulty seems to have resulted from the fact that administrative officials have not construed the language of the statute literally in determining whether benefits were payable. . . ." VA Gen. Coun. Prec. Op. 2-78 at 3 (1978) (J.A. at 19).

Thus history clearly shows not only that the VA has been inconsistent in promulgating the regulation at issue, but also that it has been well aware of its inconsistencies. In March of 1984, the General Counsel observed:

> Over the years, Congress has amended section 351 [current section 1151] and its predecessors but has not sought to challenge VA's interpretation by amendment or otherwise. It may, therefore, be urged that Congress has impliedly approved the requirement of VA error or fault in the current regulation. Although we would not rule out resort to this rule of statutory construction in a proper case, *we do not consider it applicable here because we doubt a court would agree. Kirkhuff v. Nimmo*, 683 F.2d 544 (D.C. Cir. 1982), is an excellent guide to obtaining judicial deference to our interpretations.
>
> * * * *

> We do not believe a court would accord a similar deference to the interpretation in question here. In *Kirkhuff*, the statutes . . . were arguably inconsistent, necessitating resort to rules of statutory construction. *That is not the case here where the interpretation is a gloss on a statute that on its face does not require VA fault.* Also, in *Kirkhuff*, there was an unambiguous history of administrative consistency, which cannot be said of the VA decisions involving section 351 and its predecessors. *We believe a court would, in the absence of affirmative congressional consent, be extremely reluctant to defer to VA's foreclosure of liability in this case.*

Digested Op. VA Gen. Coun. 212B (1984) (Reply Brief for the Petitioner, Appendix at 4a) (emphasis supplied).

III. REENACTMENT AND AMENDMENT OF THE ACT DO NOT JUSTIFY THE VA'S FAULT-BASED REGULATION.

Since the contemporaneous evidence surrounding the passage of the Act in 1924 supports the no-fault reading of Section 1151, the Secretary is left with the argument that the 1934 reenactment implicitly adopted a fault-based analysis, assertedly because that fault-based interpretation was "well-established" at that time. (Brief at 31). As we indicate above, nothing was well-established in 1934, other than a vacillating VA position. The Secretary's regulation cannot be saved in this case by employing the fiction that Congress is presumed to know of, and thereby to have adopted, an agency's interpretation when it re-enacts a statutory provision without change.[14]

When a regulation conflicts with the statute, the fact of subsequent reenactment of the statute is immaterial,

[14] The Court has refused to apply this presumption where there has been both a consistent agency interpretation *and* judicial decisions in eleven circuits supporting that interpretation where the interpretation was contrary to the plain language of the statute. *Central Bank*, 114 S.Ct. at 1453-55.

for Congress could not add to or expand the statute by impliedly approving the regulation. *See Leary v. United States*, 395 U.S. 6, 24-25 (1969), citing *Commissioner v. Acker*, 361 U.S. 87, 93 (1959). This Court has also noted that it is not realistic to infer approval of an administrative interpretation from Congressional silence. *See United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1978). Reenactment is not proof of approval where there is no evidence that Congress gave any particular consideration to the Secretary's regulation during reenactment of the statute. *See Rowan Cos. v. United States*, 452 U.S. 247, 262 (1981); *United States v. Calamaro*, 354 U.S. 351, 359 (1957). As this Court has often noted, it is at best treacherous to find in Congressional silence the adoption of a controlling rule of law. *See Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969). In short, the predicate conditions for applying the reenactment doctrine simply do not exist in this case. *Fogerty v. Fantasy, Inc.*, 114 S.Ct. at 1032-33.

A. Post 1924 Congressional Action

The Secretary is unable to make a plausible argument that the fault-based interpretation was known to and ratified by Congress in 1934. The regulation in place at the time was the 1927 Regulation No. 167, reissued as VA Regulations & Procedure §§ R-1120 through R-1122 (1930). (Brief App. A at 6a-10a). As the Secretary acknowledges, that regulation employed "the most liberal verbal standard" of the early regulations. On its face, however, Regulation No. 167 only precludes compensation for the "usual after results of approved medical care and treatment properly administered." That language and the VA's admonition that it should be liberally construed do not support the Secretary's contention that Congress was aware in 1934 of a "well-established fault-or-accident requirement." (Brief at 35). The recitation by the Secretary of reports to Congress that were not part of the legislative consideration of the 1934 Act are irrelevant.

In short, there is no evidence that Congress was aware in 1934 of the contention of the Secretary today. *See Thompson v. Clifford,* 408 F.2d 154, 162 (D.C. Cir. 1968). Moreover, none of the Secretary's regulations or General Counsel opinions were generally available to Congress in 1934 since the Federal Register Act was not passed until 1935 and since General Counsel opinions were not published by the VA until 1989. *See* Federal Register Act of 1935, 49 Stat. 500 (1982) (codified at 44 U.S.C. §§ 1501-1511).

The only support for this reenactment argument the Secretary musters are isolated and cryptic comments by a single senator in 1934. (Brief at 34). Once again, however, the Federal Circuit found that the senator's discussion "expressed the same commitment to compensation as that present in the discussion preceding the enactment of the 1924 Act." (Pet. App. at 15a). The remarks of a single senator do not carry the intent of Congress. *See, e.g., Pennhurst State School v. Halderman,* 451 U.S. 1, 20 (1981); *Chrysler v. Brown,* 441 U.S. 281, 311 (1979). The evidence of the existence of a fault-based agency interpretation at reenactment in 1934 is no stronger than that surrounding the original enactment in 1924. Therefore, the Court of Appeals was correct not to attribute any significance to the reenactment of the statute insofar as it relates to the validity of the Secretary's regulation today. Indeed, this is the same conclusion that the VA General Counsel reached in his most recent discussion of the history of Section 1151. "[T]he legislative history surrounding reenactment of this provision must be considered somewhat ambiguous." VA Gen. Coun. Prec. Op. 99-90 (1990) (J.A. at 36).

Congressional silence as the statute was amended four times since 1934 similarly does not justify disregarding the clear language of the statute. Despite some inconsistency in this Court's decisions regarding this so-called "acquiescence doctrine," the Court most recently has concluded that "as a general matter . . . we have stated that these arguments deserve little weight in the interpretive process." *Central Bank of Denver,* 114 S.Ct. at 1453. First, these amendments had nothing to do with the fault concept. Second, the 1962 amendment actually supports the plain meaning given the statute by the courts below. In that year, Congress removed the two-year period of limitations for Section 1151 claims and required an offset for amounts recovered by a veteran under the Federal Tort Claims Act, which is a fault-based statute. Act of Oct. 15, 1962, Pub. L. No. 87-825 § 1 (enacting 38 U.S.C. § 3010(c)), § 3, 76 Stat. 948, 950. That change makes clear that Section 1151 benefits and a veteran's rights under the FTCA are compatible but not identical. It is not logical to conclude that where Congress carefully prescribed the terms under which it would waive the sovereign immunity of the United States under the FTCA, it previously intended to impose similar limitations on Section 1151 benefits by its silence.

The contrary view makes no sense in light of the practical effect of the Secretary's position. 38 U.S.C. § 7316 (Supp. IV 1992) now provides that the *exclusive* remedy for malpractice actions against the VA is the Federal Tort Claims Act. An award to a veteran under Section 1151 that is predictated on a finding of "carelessness, negligence, lack of proper skill, or error in judgment" under the current regulation would be given collateral estoppel effect in a civil action by the veteran under the FTCA. *See United States v. Utah Construction Co.,* 384 U.S. 394 (1966). Given that federal waiver of sovereign immunity is to be narrowly construed, *see United States v. Nordic Village, Inc.,* 503 U.S. ——, 112 S.Ct. 1011 (1992), it is unlikely that Congress ever could have intended this result.

B. The Relationship Between Section 1151 and the FTCA

The creation of the offset provision by Congress makes clear that Section 1151 payments, unlike FTCA damages, were not intended to be tied to fault. Before 1946, the government could not be sued, even for damages that were clearly its fault. Relief, if any, for injustices was available only in the form of "private bills." With the enactment of the FTCA, for the first time in our history the federal government's liability for the negligence of its employees was no longer the exception but rather the rule.

When the FTCA was enacted, there were no explicit exclusions of any kind for tort suits by members of the armed forces or by veterans injured at VA facilities. Although many of the proposed bills sought to exclude servicemen and veterans from recovering under the Act, by the time of its passage "the last vestige of the exclusion for members of the armed forces disappeared." *Brooks v. United States*, 337 U.S. 49, 51-52 (1949). In *Brooks*, this Court concluded that "it would be absurd to believe that Congress did not have the servicemen in mind . . . when this statute was passed." *Id.* at 51. Thus, the Court refused to "pronounce a doctrine of election of remedies [for servicemen], when Congress has not done so." *Id.* at 53.[15] Thus, it seems clear that in the case of Section 1151 and the FTCA, Congress had purposefully allowed the two systems to coexist. *See also* Administrator's Decision No. 953 at 931 (1955).

After passage of the FTCA, courts recognized Congress' choice and permitted veterans to collect both VA benefits and damages under the FTCA. *See, e.g., United States v. Brown*, 348 U.S. 110, 113 (1954). Responding to the logic of *Brown*, the Veterans' Administrator

[15] However, later that year, in *Feres v. United States*, 340 U.S. 135 (1949), the Court found an implied exemption for servicemen injured while on active duty.

proposed coordinating legislation, which Congress enacted in 1962. *See Morgan v. United States*, 968 F.2d 200, 207 (2d Cir. 1992). That is the legislation now contained in the final sentence of Section 1151, providing as follows:

> Where an individual is . . . awarded a judgment against the United States in a civil action brought pursuant to [the FTCA] . . . then no [veterans'] benefits shall be paid to such individual for any month beginning after the date such judgment . . . becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment . . . .

38 U.S.C. § 1151.[16]

As a result, since 1962 veterans who obtain FTCA settlements or judgments prospectively lose their benefits under Section 1151 (but not other portions of Title 38) until benefits equal to the tort recovery have been foregone. In accordance with VA regulations, the offset applies "when the disability or death is considered service-connected solely by virtue of the provisions of 38 U.S.C. § 351 [now § 1151]. If the disability or death is rated service-connected under other sections of Title 38, then compensation . . . is not subject to offset . . . ." V.A. Adjudication Procedure Manual at M21-1, par. 29.53

[16] The Senate Report stated that the purpose of the bill was to preclude "duplicate recoveries from the United States for the same disability or death under section 351 [now Section 1151] and the Federal Tort Claims Act . . . ." S. Rep. No. 2042, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 3260. The House Report on the proposed setoff provision described it as similar to a "provision [that] exists today that precludes payment of disability compensation to a veteran who has been awarded disability severance pay until the amount of compensation the veteran would have been entitled to equals the amount of such severance pay." H.R. Rep. No. 2123, 87th Cong., 2d Sess. 10 (1962). The new setoff provision was both non-controversial and part of a larger bill; there is no further legislative history bearing on the issues before this Court.

(b), *quoted in Cole v. United States*, 861 F.2d 1261, 1264 (11th Cir. 1988).

To understand why the creation of the offset provision in Section 1151 supports the claim that Section 1151 does not have a fault requirement, it is useful to contrast it with the operation of the FTCA—the quintessential fault-based system. In *Morgan v. United States*, 968 F.2d at 200, the Second Circuit described the ways in which the VA benefits system diverges from a tort model. The court noted that: (1) "many disability ratings are keyed to specific anatomical losses, . . . which may or may not result in a diminution of earning ability," *id.* at 205; (2) some veterans are rated as *more than totally disabled*, *id.* at 205-06; and (3) "disability ratings are '*assigned*' to individual veterans 'on the basis of the nature and extent of the disability or combination of disabilities, *without regard to whether the particular veteran is or is not actually engaged in gainful occupation or the level of his or her earnings*[.]' " *Id.* at 206, quoting S. Rep. No. 604, 98th Cong., 2d Sess. 31 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4479, 4495 (emphasis supplied by Judge Kearse).

A system that would, for the sake of efficiency, eliminate questions of proof at the "damages" stage (questions that could be answered with such documentary evidence as tax returns and pay stubs) would surely avoid the far more difficult questions of proof that arise at the fault stage where medical malpractice cases almost always require the testimony of experts. Congress has purposefully allowed veterans to avail themselves of two recovery systems—veterans benefits and the FTCA—only one of which is designed to provide damages for fault. In its coordination of the systems, it chose not an election of remedies (which would have been proper if the systems were functional equivalents), but an offset provision that comes into play only when the recoveries overlap.

The purposes of the FTCA and Section 1151 stand in sharp contrast: the former was the culmination of a long effort to permit adjudication of government *fault*, while the latter reflects the government's goal of allocating payments to those injured while under the care of the VA. Accordingly, the FTCA includes procedures intrinsic to any fault-based system, while Section 1151 does not. It would have been irrational for Congress to create two systems to decide fault in the same cases. Moreover, the inclusion in Section 1151 of an offset provision, as opposed to an exclusivity clause *or* an election of remedies provision, both of which Congress knew how to write, reflects the reality that Section 1151 and the FTCA are not equivalent systems. Finally, the *design* of that offset provision reveals that FTCA damages include amounts above and beyond what Section 1151 benefits were meant to cover—namely, the additional recovery that, under our tort system, results from proof of fault.

IV. REGULATIONS OF THE VA SHOULD BE SUBJECT TO VIGOROUS REVIEW AND ARE NOT ENTITLED TO *CHEVRON* DEFERENCE.

As the Federal Circuit recognized, Section 1151 benefits constitute a potential "statutory right" conferred by Congress. (Pet. App. at 21a). The Secretary may not regulate away those rights by using his limited authority under 38 U.S.C. § 501 (Supp. IV 1992). Under Section 501(a), the Secretary is empowered only to enact regulations "necessary and appropriate to carry out the laws administered" and which are "consistent with those laws." That authority pertains strictly to procedural matters and does not include the right to enact substantive regulations affecting individual rights in a manner which is at odds with the administrative structure Congress has enacted. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988). This Court has previously reviewed the Secretary's authority under this statute and invalidated a regulation which constituted impermissible legislation

by the VA. *Miller v. United States*, 294 U.S. 435, 439-440 (1935). Applying the same restrictive standard, this Court upheld another VA regulation in *United States v. Zazove*, 334 U.S. 602 (1947), while maintaining that the Act must be liberally construed in favor of veterans. *Id.* at 610-611.

There is no reason to require a less restrictive review of such regulations than that enunciated by the Federal Circuit. The very reason for the creation of the Court of Veterans Appeals was the history of ineffective and unfair VA adjudication of veterans' benefits. In 1988 Congress, after many hearings and much debate, concluded that the VA was not adequately responding to the needs of veterans. *See generally* Hagel & Horan, *Five Years Under the Veterans' Judicial Review Act: The VA is Brought Kicking and Screaming Into the World of Meaningful Due Process*, 46 Me. L. Rev. 43 (1994). Congress passed legislation that fundamentally changed the nature of the VA. The legislation included the Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988) codified at 38 U.S.C. § 301 (Supp. IV 1992),[17] and the Veterans' Judicial Review Act [VJRA].[18] As Senator Cranston stated in support of creation of the Court of Veterans Appeals under the VJRA:

> [A]nother basic reason for judicial review legislation is the need to establish a basis for review of questionable agency actions restricting, withholding, or withdrawing VA benefits. . . . There is also the potential for unduly restrictive legal opinions from the

[17] Congress gave the VA Cabinet level status in this Act, in part, to help it compete for resources and to control poor claims development and weaknesses in complex cases. S. Rep. No. 342, 100th Cong., 2d Sess. 30-31 (1988). The Senate Report also cites a lack of uniformity in VA decision making at the regional level. *Id.* at 35.

[18] *See generally* Brief for *Amicus Curiae* Paralyzed Veterans of America, *et al.* at 13-16.

> Office of the General Counsel which may operate to deny veterans access to benefits to which they are entitled under the law.
>
> * * * *
>
> I am suggesting that outside review by an independent entity to determine whether governmental action is legal and whether it is fundamentally fair would benefit all parties involved. The VA would have its processes subjected to appropriate scrutiny and, to the extent the agency's actions were upheld, would be vindicated. Likewise, to the extent the agency's actions were held unlawful or fundamentally unfair, steps could be taken to improve the process so as to ensure that the agency is fulfilling its mission to serve veterans in the best possible fashion.

134 Cong. Rec. 31465 (October 18, 1988) (statement of Sen. Cranston).

Three elements of the VJRA are particularly relevant to the issue of whether VA regulations are entitled to any deference: (1) the provision for judicial review of BVA decisions; (2) the requirement that the VA comply with the rulemaking procedures of the Administrative Procedure Act; and (3) the requirement that the VA publish General Counsel Precedent Opinions in the Federal Register. Prior to the VJRA, no decision of the VA in adjudicating a veteran's claim was reviewable by any court. 38 U.S.C. § 211(a) (1982). At the same time, however, the regional offices and the BVA were bound to follow the regulations and the General Counsel opinions of the VA in adjudicating such claims. 38 U.S.C. § 4004(c) (1958) (codified as amended at 38 U.S.C. § 7104 (Supp. IV 1992)). Therefore, prior to 1988 not only was there no judicial scrutiny of VA regulations, there existed no mechanism even within the VA whereby an affected veteran could challenge the lawfulness of a VA regulation. Now COVA has the express authority, pursuant to 38 U.S.C. § 7261(a)(3)(C) (Supp.

IV 1992), to "hold unlawful . . . regulations issued or adopted by the Administrator . . . found to be in excess of statutory . . . authority . . . or in violation of statutory right." In this regard, it is important to note that Congress rejected a request by the VA General Counsel to require the new court to afford *conclusive weight* to VA regulations. *See Judicial Review Legislation: Hearing Before the Senate Comm. on Veterans' Affairs on S. 11, the Proposed Veterans Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act*, S. Hrg. 100th Cong., 2d Sess. 508 (1988) (statement of Donald L. Ivers, VA General Counsel).

The second significant congressional change pertains to application of the APA to VA rulemaking. Regulations of the VA were never published for notice and comment in the Federal Register prior to 1972. The VA had exempted itself from the notice and comment requirements of the Administrative Procedure Act under the exception contained in 5 U.S.C. § 553(a)(2) (1982) for matters related to "benefits." S. Rep. No. 100-418, 101st Cong., 2d Sess. 48 (1988). In 1972, however, the VA voluntarily adopted 38 C.F.R. §1.12 (1973), which obligated the VA to follow the provisions of the APA for notice and comment on proposed regulations. Hence, the only time that any version of the regulation at issue in this case was ever published in the Federal Register for notice and comment occurred in 1978 when the VA's so-called liberalizing regulation was proposed. 43 Fed. Reg. 34,505 (1978).[19]

[19] That publication—the only publicly noticed regulation of the VA on this issue until after Mr. Gardner filed his claim—expressly stated, contrary to the Secretary's position that Congress intended a fault-based system, that the proposed amendment to 38 C.F.R. § 3.358(c)(3) would provide benefits for an "accident without regard to whether the accident resulted from negligence on the part of the Veterans Administration." 43 Fed. Reg. 34,505 (1978). This proposed change was said to derive from "careful study of

The legislative history of the VJRA shows that the VA voluntarily committed itself to comply with the APA only after being pressured by the Administrative Conference of the United States. H.R. Rep. No. 5288, 100th Cong., 2d Sess. 27-28 (1988). With the passage of the VJRA, however, Congress not only required the VA to engage in notice and comment rulemaking, but also prohibited the VA from relying on the APA Section 553(a)(2) exception to the notice and comment requirement, as the VA had prior to 1972. 38 U.S.C. § 501(d) (Supp. IV 1992). It is clear that Congress in 1988 was dissatisfied with VA regulatory practice. Therefore, no deference is due to VA regulations that predate that time since those regulations are not the product of public exchange with VA rulemakers. This fundamental principle which underlies judicial deference to agency regulations is totally absent in the regulations involved in this appeal.

The third significant change in the VJRA pertains to the proliferation of General Counsel opinions. Congress in 1988 was concerned with the VA practice of interpreting its regulations through periodic General Counsel opinions without making these interpretations available to the public through publication in the Federal Register. *See* 134 Cong. Rec. S31,772 (1988). Although the Federal Register Act of 1935 required publication of all documents of substantive legal effect, the VA never published its General Counsel opinions in any publication available to the public. It was not until 1989, when the VA adopted 38 C.F.R. § 14.507 (1990), pertaining specifically to General Counsel opinions, that the VA began publishing General Counsel opinions. However, under

the legislative history of 38 U.S.C. § 351." *Id.* The VA, however, has never published for notice and comment its regulatory requirement that there must be a showing of some form of fault on the part of the VA before benefits may be awarded to those injured as a result of medical procedures.

the rubric of that regulation, only a General Counsel opinion designated by the General Counsel as a "precedent opinion" shall be published in the Federal Register in accordance with 5 U.S.C. § 552(a)(1) (1982). Undesignated opinions are deemed by the Secretary to be exempt from notice and rulemaking under 5 U.S.C. § 552(a)(2) (1982), despite Congress' mandate in 38 U.S.C. § 501(d) that the VA may never utilize that exception to notice and comment rulemaking. *See* 54 Fed. Reg. 5610-5612 (Feb. 6, 1989).[20]

Hence, the General Counsel opinions upon which the Secretary relies clearly lack fundamental elements of fairness which are the predicate to judicial deference to agency interpretations. Indeed, none of the General Counsel opinions cited by the Secretary surrounding the enactment of the statute in 1924 and the reenactment in 1934 have since been designated as precedent opinions and, hence, would not be binding on the VA today under 38 C.F.R. § 14.507 (1990). It is also noteworthy that the adjudicatory General Counsel opinions rendered during this early time period were not available at all to the public because of the confidentiality statute contained in the Act. *See* Pub. L. No. 68-242, ch. 320, title I, § 30, 43 Stat. 607, 615 (1924), codified at 38 U.S.C. § 3301 (1982).

These circumstances reflect an agency in "splendid isolation" from all the concomitants of public and judicial review which are predicates to judicial deference to its decisions. In the absence of these predicates, the Secretary's assurance that Congress has provided vigilant oversight to VA regulations is inadequate. (Brief at 40).

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[20] The VA continues to avoid the notice and comment requirement by relying in large measure on manuals of procedure, even though the VA enjoys no exemption at all from notice and comment rulemaking for such standards. *See Fugere v. Derwinski*, 1 Vet. App. 103 (1990), *aff'd*, 972 F.2d 331 (Fed. Cir. 1992).

Indeed, Congress itself has confessed its own inability to oversee the VA system.

> Although the Committees on Veterans' Affairs in both Houses carry out significant oversight of the activities of the VA, the limited resources of the Committees do not allow for thorough review and congressional action to resolve satisfactorily all of the legal and policy issues arising in such a large and complex agency.

134 Cong. Rec. S16,643 (1988) (statement of Sen. Cranston).

In this state of isolation, the VA has promulgated regulations which are substantive in nature. The VA rule at issue here, in all its incarnations, was and is substantive because it "affect[s] individual rights and obligations." *Morton v. Ruiz*, 415 U.S. at 232. A substantive rule, however, cannot be given the force and effect of law if it is not the product of "certain procedural requisites," among them the notice and comment requirements of the APA. *Chrysler v. Brown*, 441 U.S. at 301; *see also Lincoln v. Vigil*, 508 U.S. ——, 113 S.Ct. 2024, 2033-35 (1993). Additionally, an agency's authority for promulgation of a substantive rule "must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler*, 441 U.S. at 302.

The regulations of the VA at issue meet neither requirement. As we have indicated above, not only were these regulations not the product of notice and comment under the APA, but also they constituted a secret body of law known only within the agency and among some practitioners. With respect to congressional authorization for this regulation, the only source of that power is 38 U.S.C. § 501 which permits the Secretary only to prescribe regulations "necessary or appropriate to carry out the laws . . . and consistent with those laws." This

is the same Congressional language found by this Court not to justify enactment of a substantive regulation in *Chrysler v. Brown*, 441 U.S. at 304. Nothing in Section 501 would even remotely authorize the promulgation of the VA substantive regulations or interpretations pertinent to the issue in this case. The Court of Veterans Appeals has concluded that similar regulations, promulgated after enactment of the VJRA without notice and comment, are invalid in VA proceedings. *Fugere v. Derwinski*, 1 Vet. App. at 103.

Vigorous review of regulations is also shown to be justified by the jurisprudence of the Court of Veterans Appeals in the six years of its life. COVA has repeatedly criticized the VA for its misinterpretation of Congressional statutes and for its intransigence and reluctance to conform its practices to the realities of judicial review. For example, in *Jones v. Derwinski*, 1 Vet. App. 596 (1990), COVA enjoined the VA from directly contacting represented veterans and from providing to veterans outdated and erroneous information. The Secretary was also sanctioned for not promptly correcting an inaccurate representation made to the court upon discovery of that inaccuracy. In *Fugere v. Derwinski*, 1 Vet. App. at 103, COVA held that the VA could not rescind a directive from its adjudication manual without public notice and comment. In *Tobler v. Derwinski*, 2 Vet. App. 8 (1991), COVA was obligated to direct the VA to apply the decisions of the court as precedent in adjudicating claims at the regional offices and before the BVA. In *Hines v. Derwinski*, 2 Vet. App. 30 (1991), COVA issued a show cause order as to why costs should not be granted against the VA for failing to respond to a veteran's record request for over six years. In *Adamski v. Derwinski*, 2 Vet. App. 46 (1991), COVA sanctioned the VA for dilatory tactics in failing to file the record on appeal when ordered. In *Moore v. Derwinski*, 2 Vet. App. 67 (1992), COVA ordered the Secretary to show cause why he should not be

subject to contempt for failing to pay benefits as ordered by the court. In *King v. Brown*, 4 Vet. App. 519 (1993), COVA criticized the VA failure to provide an accurate and relevant record and basis for decisions on appeal.

In the Report for Fiscal Year 1993, the Chairman of the Board of Veterans Appeals estimated that the time necessary for the BVA to decide a single appeal beginning in fiscal year 1995 will be 945 days, an increase from the 139 days needed in 1991, even though the number of decisions in 1995 is projected to be one-third fewer than 1991. Report of the Chairman of the Board of Veterans Appeals for Fiscal Year 1993 at 44, 49. This delay is attributed by the Chairman to the "increased formality and complexity of the adjudication process" caused by judicial review. *Id.* at 24. In remarks to Congress, the Chairman stated as follows:

> I will not mince words, Mr. Chairman. We are where we are because of the Veterans' Judicial Review Act. That landmark legislation, which created the Court of Veterans Appeals, has increased the time a claimant must wait for a final decision. There is no doubt that the Court is an adversarial system grafted on to one which was designed to function in a nonadversarial manner. The result is that the mere availability of judicial review has made the administrative adjudication process more formalistic, rigid, complex, and inherently more time-consuming.

Hearings Before the Subcomm. on Compensation, Pension, and Insurance, House Comm. on Veterans' Affairs, 103d Cong., 2d Sess. 1 (1994) (statement of the Hon. Charles L. Cragin, Chairman, Board of Veterans Appeals). Statements like these make it clear that the VA wishes to return to the days before judicial review. As the Federal Circuit noted, however, Congress' lengthy deliberation over the Veterans' Judicial Review Act, and its carefully crafted scheme for judicial review of VA regulations, counsels for "vigorous review."

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

FRED P. GARDNER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1128

JESSE BROWN, SECRETARY OF
VETERANS AFFAIRS, PETITIONER

v.

FRED P. GARDNER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent contends that a no-fault interpretation of 38 U.S.C. 1151 (Supp. IV 1992) is necessary in order to place veterans with non-service-connected disabilities on an equal footing with those whose disabilities arose from military service. See Resp. Br. 14-16. That contention is based on a misunderstanding of the history and structure of the benefits provisions in question.

Congress first extended direct disability benefits, including free medical care, to World War veterans with service-connected conditions in 1917. Act of Oct. 6, 1917 (1917 Act), ch. 105, §§ 300-314, 40 Stat. 405-408. The 1917 Act extended such benefits to any servicemember with a "disability resulting from personal injury suffered or disease contracted in the line of duty" (§ 300, 40 Stat.

405) – language still found in the service-connected benefit provisions cited by respondent. See 38 U.S.C. 1110, 1131 (Supp. IV 1992). The 1917 Act further provided that, subject to certain requirements for establishing service connection, compensation would be payable for death or disability "proximately resulting" from a wartime injury. 1917 Act § 306, 40 Stat. 407; see also World War Veterans' Act, 1924 (1924 Act), ch. 320, § 206, 43 Stat. 622 ("Where there is official record of injury during service[,] compensation shall be payable * * * for death or disability whenever occurring, proximately resulting from such injury.").

These statutory provisions permitted compensation for disabilities resulting, not only from the natural progress of a wartime injury itself, but also from any reasonably foreseeable consequence of such an injury, including one arising out of medical care rendered, under the statute, for the original service-connected condition. See generally 7 Bureau of War Risk Ins. Gen. Coun. Op. 812, 814 (1920) (morphine addiction compensable where proximately caused by treatment for wartime head injury); 21 V.A. Gen. Coun. Op. 2822-A, 2822-C to 2822-D (1922) (dictum); 25 V.A. Gen. Coun. Op. 2974 (1923) (dictum); 26 V.A. Gen. Coun. Op. 3891 (1923) (disability incurred in industrial accident compensable where proximately caused by wartime injury and treatment therefor); 21 V.A. Gen. Coun. Op. 3352 (1922) (compensation payable for in-service football injury and natural progress thereof, but not for additional injury resulting from Dartmouth 1919 season or later industrial accident, which constituted independent intervening causes); see also 55 V.A. Gen. Coun. Op. 239 (1928) (discussing proximate causation); Digested V.A. Gen. Coun. Op. (Mar. 17, 1971) (same).[1]

[1] As with our opening brief (at 24 n.14), we will lodge with the Clerk and provide to respondent's counsel copies of original VA materials that may not otherwise be readily available.

Where a veteran incurred some new disability by reason of medical care negligently rendered by the VA, however, that mistreatment would apparently have been treated as an intervening, superseding cause that severed the proximate causal connection between the veteran's original condition and his subsequent disability. Disabilities caused by negligent treatment would therefore not have been deemed compensable under the 1917 Act. See generally 28 V.A. Gen. Coun. Op. 981 (1924) (accepting factual finding of service connection, but noting that claim would not normally lie for "improper conditions to which [veteran] was subjected in treatment"); see also 19 V.A. Gen. Coun. Op. 444 (1922) (government not liable for all mishaps during hospitalization, including assault by fellow patient). Similarly, if a veteran was injured during the course of examination or treatment for a condition that the VA ultimately determined was not service-connected, then any resulting disability was considered "not due to military service." 28 V.A. Gen. Coun. Op. 1309 (1924); see also 20 V.A. Gen. Coun. Op. 4933 (1922); 21 V.A. Gen. Coun. Op. 2822-A (1922); 25 V.A. Gen. Coun. Op. 2974 (1923). Because the statute authorized compensation and treatment only for disabilities proximately resulting from service-connected conditions, the VA evidently considered itself powerless to compensate veterans whose disability originated or increased under such circumstances.

It was most likely in order to remedy these gaps in the disability benefits scheme that VA Director Hines proposed, in 1923, that Congress add to the statute the provision that became Section 1151. See, *e.g.*, *World War Veterans' Legislation: Hearings on Proposed Legislation Before the House Comm. on World War Veterans' Legislation*, 68th Cong., 1st Sess. 122-123 (1924) [*House*

Hearings].[2] That provision could not have been intended to authorize the VA to provide compensation for disabilities proximately resulting from service-connected conditions, including from the normal course of careful medical treatment, because disabilities of that sort were already compensable under the 1917 Act. And it could not have been intended to address anomalies in the benefits available to veterans with non-service-connected conditions—to put them "on a par" with those treated for service-connected ailments (Resp. Br. 20)—because, with limited exceptions for tubercular and neuropsychiatric illnesses, those with conditions determined not to be service-connected were not eligible for VA treatment at all before 1924.[3] Section 213 of the 1924 Act, 43 Stat. 623, was therefore most probably intended instead to provide the VA with the authority to compensate veterans for disabilities that were proximately caused, not by their military

[2] Reproducing a letter to Senator David Reed from VA Director Hines, endorsing the proposal to provide compensation for veterans injured as a result of vocational training: "I would extend the principle * * * to include also ratable disabilities incurred without fault and due to the hazards of medical and surgical treatment. It seems that the whole purpose of giving such treatment * * * is defeated if, in the course of the * * * treatment, a disability is incurred without fault and due solely to the * * * treatment for which there is no authority to compensate because, of course, such disability is not directly connected with the service." The references to disabilities "incurred without fault" presumably refer to the absence of fault on the part of the veteran who "incurred" the disability.

[3] For the exceptions, see Act of Mar. 4, 1923, ch. 291, § 4, 42 Stat. 1524. Indeed, during the House hearings on the 1924 Act some question arose as to whether the benefits proposed under new Section 213 (now Section 1151) would apply at all to veterans with non-service-connected conditions, if the proposal to provide VA treatment for such conditions was also enacted. *House Hearings* 114-115.

service, but by negligent treatment or by some unforseeable medical accident.[4]

The same 1924 amendments that added what became Section 1151 also authorized the VA, for the first time, to provide medical benefits for non-service-connected conditions. 1924 Act § 202(10), 43 Stat. 620-621. Because the point of Section 1151 was to provide benefits to veterans for additional disabilities incurred as a proximate result of faulty VA medical care or unforeseeable medical accidents (rather than of the condition for which care was originally rendered), the benefits of the new provision extended to all veterans who incurred such disabilities, regardless of the original reason for their treatment. The fact that benefits under Section 1151 extend to disabilities arising out of treatment for both service-connected and non-service-connected conditions should not, however, obscure the fact that the government's assumption of responsibility in such cases rests on the premise that the disabling "injury" involved was a proximate result of medical care rendered by the government, rather than of the original condition requiring treatment.[5]

[4] Before 1924 the statute provided for VA examinations to determine whether a particular ailment was service-connected. See, *e.g.*, 1917 Act § 303, 40 Stat. 406-407. As suggested above, one purpose of Section 213 was apparently to provide compensation for veterans whose disability increased after such an examination, even though the examination determined that the veteran's additional condition was not service-connected. The original language of Section 213, which covered additional disabilities arising "as the result of training, hospitalization, or medical or surgical treatment," was not, however, considered broad enough to reach such cases. Congress therefore amended the statute in 1925 specifically to cover veterans whose additional disability arose "as a result of having submitted to examination" by the VA. Act of Mar. 4, 1925, ch. 553, § 11, 43 Stat. 1308.

[5] As noted in our opening brief (at 30 n.17), the same requirement of proximate causation applies to compensation under Section 1151 for injuries suffered "as the result of * * * the pursuit of a course of

Where an additional disability results from negligent medical treatment or an unforseeable accident during such treatment, Section 1151 treats the disability as the proximate result of the government's medical care. When an additional disability results from ordinary, non-negligent medical treatment by the VA of a pre-existing condition or disease, however, the statute and the regulations implementing it generally treat that disability as having been proximately caused by the condition requiring treatment, not by the VA's provision of medical services. Congress has made no decision to assume general responsibility for conditions, like respondent's herniated disc, that bear no relation to a veteran's military service and that result from non-negligent medical treatment.[6] Respondent received

vocational rehabilitation" under VA auspices. See 38 C.F.R. 3.358(c)(6) (compensation "is not payable unless there is established a direct (proximate) causal connection between the injury or aggravation of an existing injury and some essential activity or function which is within the scope of the vocational rehabilitation course"). Amicus National Veterans Legal Services Project argues (Br. 12-13) that the VA requires "*only* [a] causal connection" (emphasis added) in vocational rehabilitation cases. In both medical and rehabilitation cases, however, what both the statute and the implementing regulations require is a *proximate* causal connection between a claimant's disability and some *factual* cause for which the government has chosen to accept responsibility. In the case of medical treatment, that factual cause must be some inappropriate or unforeseeable occurrence during the course of the medical care rendered by the VA.

[6] The entire system of veterans' benefits is replete, now as in 1924, with differences in the benefits available for service-connected and non-service-connected conditions. Compare generally 38 U.S.C. 1101 *et seq.* (Supp. IV 1992) with 38 U.S.C. 1501 *et seq.* (Supp. IV 1992). The availability and rates of disability compensation, for example, vary widely depending on whether a particular disability is service-connected. Compare, *e.g.*, 38 U.S.C. 1110 and 1114 (Supp. IV 1992) with 38 U.S.C. 1521 and 1522 (Supp. IV 1992). Veterans with service-connected conditions generally have priority for VA medical

the full medical benefit that Congress has accorded veterans with non-service-connected conditions: he received free treatment for his back condition, and so far as the record shows that treatment was appropriate and competent. Any further disability incurred by respondent as a foreseeable result of proper medical care is not the responsibility of the government under the statutory plan. In light of the general absence in American law of provider liability for the normal risks of properly rendered medical care, respondent can offer no persuasive reason why the government should or would have chosen to assume such liability through the enactment of Section 1151 in 1924.

2. Respondent nonetheless contends (Br. 10-16) that the "plain language" of Section 1151 requires the result that he seeks in this case. That contention is, for the most part, sufficiently answered by the arguments set out in our opening brief (at 13-21).

Respondent argues in particular that the requirement that a disability arise "as a result of" VA medical care unambiguously requires only a cause-in-fact relationship between the disability and that care. Resp. Br. 11-12; see also National Veterans Legal Services Project (NVLSP)

care. See 38 U.S.C. 1710(a) (Supp. IV 1992). Eligibility for and the amount of survivors' benefits also vary on the basis of service connection. Compare, *e.g.*, 38 U.S.C. 1310-1317 (Supp. IV 1992) with 38 U.S.C. 1541-1543 (Supp. IV 1992). See also, *e.g.*, 38 U.S.C. 3701(b)(2), 3702(a)(2)(B) (Supp. IV 1992) (housing and small business loans); 38 U.S.C. 3901 (Supp. IV 1992) (special vehicle allowances); 38 U.S.C. 3221, 3222, 3202(1)(A) (Supp. IV 1992) (education benefits); 38 U.S.C. 2303, 2307 (Supp. IV 1992) (burial allowances). Respondent's contention that the VA's General Counsel has suggested that there should be no difference in treatment under Section 1151 between service-connected and non-service-connected disabilities (Resp. Br. 15-16, citing V.A. Gen. Coun. Op. 80-90 (1990)) is incorrect for the reasons stated in our reply brief at the petition stage (at 3 n.2).

Amicus Br. 12-13. This Court has previously held, however, that the similar statutory term "by reason of" may be read to establish either a purely factual causation standard, or a proximate causation standard more closely tied to the history and purposes of the statute in question. *Holmes* v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1316-1317 & nn.10-12 (1992). In *Holmes,* the Court concluded (*ibid.*) that the phrase "by reason of" in 18 U.S.C. 1964(c), which permits civil actions for violations of the Racketeer Influenced and Corrupt Organizations Act, should be read to require more than mere factual causation of a plaintiff's injury by the defendant's violation of the statute. The Court reached that conclusion at least in part on the basis of a consideration equally applicable in this case: "the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover." 112 S. Ct. at 1316. The VA has resolved a similar ambiguity in Section 1151 in essentially the same way, and the Court should defer to that reasonable interpretation.

3. a. Respondent argues (Br. 22-30) that the early administrative materials concerning the interpretation of Section 1151 reveal nothing more than "confusing inconsistencies influenced by concerns that have nothing to do with the original intent of Congress." Resp. Br. 26. As discussed in our opening brief (at 26-31), we believe that those materials demonstrate the articulation, in the years immediately following enactment of Section 1151, of an interpretation limiting benefits under that provision to cases where there was evidence of VA fault, or of some other unforeseen and untoward event sufficient to break the normal causal connection between an originally non-service-connected condition and the new disability for which benefits were claimed.

The development of successive regulations implementing the new provision, and the administrative decisions thereunder, reveal an ongoing process of interpretation in the light of practical experience. That is hardly surprising:

it was only after 1924 that the VA treated any significant number of patients for non-service-connected disabilities, and it was in that wholly new context that the precise limits of coverage under the new Section 213 first became particularly significant.[7] What is clear from the course of administrative proceedings in the first decade following enactment of the statute, however, is that under the leadership of General Hines, who first proposed enactment of Section 213 and who directed the VA from 1923 to 1945, the VA consistently interpreted the statute to require something more for an award of benefits than "[t]he usual after results of approved medical care and treatment properly administered." VA Reg. No. 167 (Feb. 21, 1927), § 7701(B)(4), *reprinted at* Gov't Br. App. 5a; see Gov't Br. 28-29. Assuming that respondent's factual allegations are true (see Gov't Br. 17 n.10), he claims compensation under Section 1151 for precisely such "usual after results" of proper care for a non-service-connected back condition. That claim would have been denied in 1927, and it was properly denied in this case.

b. Moreover, as discussed in our opening brief (at 31-36), there is ample reason to believe that Congress was aware of the VA's construction of Section 213 of the 1924 Act when it reenacted that Section in 1934 after having

[7] As respondent points out (Br. 27-29), there have been changes over the years in the details of the VA's implementation of the requirements of Section 1151, particularly with regard to compensation in cases involving unforeseeable and untoward events ("accidents") rather than VA fault. The continuing effort to refine the interpretation of what adverse medical outcomes were intended to be covered by the statute reflects responsible administration of a statute whose implementation sometimes requires difficult decisions arising out of novel conditions. See, *e.g.*, V.A. Gen. Coun. Op. 99-90 (1990) (HIV infection resulting from blood transfusion compensable as an "accident" if it occurred at time when risk of such infection was not reasonably foreseeable).

repealed it in 1933. As we have explained (Br. 34), the Senate sponsor of the amendment that restored Section 213 explained the provision to his colleagues as one relating to veterans "disabled by reason of mistreatment on the part of a Government agent." Perhaps even more important, in the economic context of the Great Depression, both the Senator and the VA offered Congress very modest estimates of the number of individuals covered by the provision and the cost of restoring their benefits—estimates that could not have been so low had the provision been intended to provide no-fault compensation for disabilities resulting from the many risks of competent medical care. See Gov't Br. 34-35. The debates over reenactment of veterans' benefits, including Section 213, dwelt at some length on the cost of the benefits to be restored, and on whether they would primarily benefit veterans whose disabilities were directly connected to their national service. See, *e.g.*, 78 Cong. Rec. 3047-3057, 3202-3210, 3289-3294, 3496-3497 (1934); *id.* at 5540-5541 (veto message); *id.* at 5541-5544, 5573-5606 (debate on overriding veto); see also Gov't Br. 35 n.21 (quoting Administrator of Veterans' Affairs Ann. Rep. 1-2 (1933)). It is quite understandable that Congress in 1934 would reenact a provision intended to compensate a small number of veterans who had been injured "by reason of mistreatment on the part of a Government agent." It is implausible, on the other hand, that Congress would have enacted or reenacted a provision intended to insure veterans treated by the VA for non-service-connected conditions against the risks of competently rendered medical care.

c. Respondent contends (Br. 33-37) that the 1962 amendment of Section 1151 to require the offset of benefits awarded to a veteran under the Federal Tort Claims

Act (FTCA) demonstrates that Congress could not have intended to require any demonstration of "fault" or "accident" under Section 1151. We perceive no incompatibility, however, between the availability of a standard tort action under the FTCA and the application of a "fault or accident" requirement to claims for benefits under Section 1151.

Section 1151 provides an informal, non-adversarial mechanism for the award of limited government benefits. After a claim is filed, the VA is required to assist the veteran in ascertaining the facts of his or her case. 38 U.S.C. 5107(a) (Supp. IV 1992); 38 C.F.R. 3.159. If those facts demonstrate that the veteran has incurred an additional disability by reason of some fault or accident, rather than merely by reason of foreseeable medical risks of proper treatment, then the veteran is entitled to prescribed pension and medical benefits, determined as though the additional disability were service-connected.[8] Moreover, in VA proceedings, including those under Section 1151, the veteran is statutorily accorded the benefit of the doubt on factual issues. 38 U.S.C. 5107(b) (Supp. IV 1992).

Under the FTCA, on the other hand, the same veteran is entitled to sue the government in an adversary proceeding.[9] In such a proceeding the veteran is required to pro-

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[8] As we noted in our opening brief (at 29-30), even leaving aside the issue of unforeseeable "accidents," the VA "fault" required under Section 1151 need not necessarily rise to the level of malpractice as defined for tort-law purposes.

[9] We are aware of no support for respondent's contention (Br. 33) that the results of the informal fact-finding conducted for purposes of evaluating an administrative claim under Section 1151 would have preclusive effect, as to either the veteran or the government, in a subsequent judicial proceeding under the FTCA. Respondent cites *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), but that case involved specific contractual and statutory pro-

cure and produce admissible evidence, and bears the burden of persuasion. If the finder of fact determines that the veteran has been injured through VA fault, then the veteran is entitled to collect full compensatory damages, including damages for pain and suffering.

Thus, claims under Section 1151 and under the FTCA offer distinctly different procedures, burdens, and potential benefits. Respondent relies on the special characteristics of the VA claims system to argue (Br. 16-20) that Congress could not have intended to impose any fault requirement on veterans seeking benefits. But the use of informal claims procedures, the provision of assistance to veterans in developing the facts of their cases, and the resolution of doubts in favor of veteran claimants do not change the substantive requirements established by the law for the award of benefits. Moreover, there is no inconsistency between an informal and generously structured administrative process leading to the award of limited benefits, and a much more formal and rigorous judicial process that can yield far greater compensation. Given the fully compensatory character of FTCA relief, it is easy to understand why Congress decided that veterans who recovered substantial sums in FTCA actions should not receive, in addition, duplicative benefits under Section 1151. That decision does not at all call into question the VA's construction of Section 1151 to require evidence of fault or "accident" as a predicate for the award of benefits under that provision.

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visions regarding the finality of administrative fact finding in government contract disputes. In contrast, the FTCA specifically provides that "[d]isposition of any claim by the * * * head of a federal agency shall not be competent evidence of liability or amount of damages" in judicial proceedings under the Act. 28 U.S.C. 2675(c).

4. Finally, respondent argues (Br. 37-45) that the VA's longstanding administrative and regulatory interpretation of Section 1151 is "impermissible legislation" (Br. 37), and in any event is not entitled to deference from the courts. The regulation in question (38 C.F.R. 3.358) is an interpretation and implementation of the benefits provided by statute, and plainly falls within the VA's statutory authority "to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the [VA] and are consistent with those laws." 38 U.S.C. 501(a) (Supp. IV 1992); see also 1924 Act § 5, 43 Stat. 608 (VA director "shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes"). In addition, we note that the portion of Section 3.358 at issue in this case was amended and readopted, after an opportunity for notice and comment, in 1978. 43 Fed. Reg. 34,505 (1978) (proposal); *id.* at 51,015 (final rule).

As to the merits of the regulation, the VA's construction of the statute is entitled to the same deference that this Court would accord any similar interpretation adopted by an agency charged by Congress with administering a federal statute. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). Congress has specifically delegated to the Secretary responsibility for the "proper execution and administration" of all "laws providing benefits and other services to veterans." 38 U.S.C. 303, 301(b) (Supp. IV 1992); see also 1924 Act § 5, 43 Stat. 608 (VA director "shall administer, execute, and enforce the provisions of this Act"). The VA informs us that in discharging that responsibility in fiscal 1993 alone it processed some 3.2 million documents relating to claims for compensation or pensions under the veterans' benefits statutes, and provided medical care to

more than 1.1 million inpatients at 171 VA hospitals and 165 VA nursing homes or domiciliary facilities.

Evaluating benefits claims regularly involves resolving factual and medical questions about the nature, source, and degree of a claimant's disability, as well as legal questions about the availability of benefits in particular factual situations. Those legal determinations, expressed both in general regulations and in individual adjudications, are informed by the VA's extensive experience in administering the veterans' benefits system, and reflect "a full understanding of the force of the statutory polic[ies]" in question that depends on "more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron,* 467 U.S. at 844 (quoting *United States* v. *Shimer,* 367 U.S. 374, 382 (1961)). Under those circumstances, the courts should defer to reasonable interpretations by the VA of the statutes that have been entrusted to its administration, just as they would defer to similar interpretations of other statutes by other administrative agencies. There is no indication that Congress's 1988 decision to provide for judicial review of VA regulations and decisions (Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988)), so as to provide veterans with the same protections available to recipients of other government benefits, was intended to deny to the VA the same deference that would normally be accorded by reviewing courts to any other administrative agency.[10]

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[10] See S. Rep. No. 418, 100th Cong., 2d Sess. 49-62 (1988); see especially *id.* at 50 (statute provides opportunity for review "in a manner similar to that enjoyed by claimants before almost all other Federal agencies"), 60 (scope-of-review provisions for non-factual issues "are derived specifically from section 706 of the APA. Thus, it is the Committee's intention that the court shall have the same authority as it would in cases arising under the APA to review and act upon questions other than matters of material fact * * * such as questions concerning the validity of a rule or regulation").

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

AUGUST 1994

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

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JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,

Petitioner,

v.

FRED P. GARDNER,

Respondent.

* * * * * * * * *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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BRIEF OF AMICUS CURIAE FOR THE STATE OF TEXAS IN SUPPORT OF RESPONDENT

* * * * * * * * *

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No. 93-1128

* * * * * * * *

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

* * * * * * * *

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,

Petitioner,

v.

FRED P. GARDNER,

Respondent.

* * * * * * * *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

* * * * * * * *

BRIEF OF AMICUS CURIAE FOR THE STATE OF TEXAS IN SUPPORT OF RESPONDENT

* * * * * * * *

INTEREST OF AMICUS CURIAE

This brief in support of Fred Gardner, Respondent, is submitted pursuant to Supreme Court Rule 37. Amicus curiae, State of Texas, appearing through the Attorney General of Texas, seeks this Court's affirmance of the ruling of the United States Court of Appeals for the Federal Circuit in this case, upholding the ruling of the United States Court of Veterans Appeals on November 25, 1991. The State of Texas, through its Legislature and by popular vote, has

determined that providing benefits for veterans constitutes an important public purpose. The exceptional nature of the importance attached to veterans' interests by the State of Texas is established both by amendment to the Texas Constitution and by statute. The Texas Constitution singles out veterans as an exception to the constitutional provision prohibiting the Legislature from authorizing any grants of public moneys to any individuals, associations of individuals, or municipal or other corporations. Tex. Const. art. III, § 49-b (establishing the Veterans' Land Board for the purpose of providing a means of granting land to war veterans); and art. III, § 49-b-1 (providing for bonds for Veterans' Housing Assistance Fund "in recognition of their service to their state and country.") The Texas Legislature established the Texas Veterans Commission in order to assist veterans in presenting, proving, and establishing claims and benefits they may have under federal, state or local law. *See* Tex. Gov. Code § 434.007.

The issue before this Court is whether the Veterans Administration can limit benefits to veterans injured as a result of treatment in a veteran's hospital by applying requirements not imposed by the enabling legislation. Resolution of the issue before this Court will affect the ability of veterans to apply for disability benefits currently denied them in spite of clear statutory language to the contrary. Texas, therefore, has an interest, reflected in its constitution and statutes, in assisting Respondent and other veterans similarly situated to establish their claims to benefits statutorily granted by Congress, but denied by the Veterans Administration.

SUMMARY OF THE ARGUMENT

The issue presented by this case is whether the interpretation of the Veterans Administration of a statute which it administers is permissible. Section 1151, 38 U.S.C., provides that veterans who "have suffered an injury ... as the result of hospitalization, medical or surgical treatment ... and

such injury ... results in additional disability to or the death of such veteran, disability or death compensation ... shall be awarded in the same manner as if ... service-connected." By the promulgation of Section 1151, 38 C.F.R. 3.358, the Secretary requires that the injury be caused *by accident or negligence* before benefits are payable. Petitioner argues that the addition of the accident or negligence element is permissible agency interpretation of ambiguity in the statute, and that based on the legislative history, and the deference due agency interpretation, the Court of Appeals' decision should be reversed. Amicus disagrees.

If statutory language is clear on its face, a reviewing court need not apply principles of statutory construction. If a statute is ambiguous, or is silent with respect to a specific issue, the function of the court is to discern the meaning of the words used by the legislature. Deference is due to agency interpretation only after applying principles of statutory construction. Agency interpretations fail to the extent they conflict with statutory language. Non-action by Congress may have significance as ratifying an agency's interpretation of a statute, but as a guide to statutory interpretation, it is not favored.

Amicus herein would urge that 38 U.S.C. § 1151 (Supp. IV 1992) is clear on its face, and that the Court of Veterans Appeals and the Court of Appeals for the Federal Circuit correctly found that the Secretary of Veterans Affairs had impermissibly limited the application of this statute by requiring veterans who had been injured as a result of treatment in a veterans hospital to show accident or negligence in order to qualify for disability or death benefits. The language of the statute is unambiguous and as such this Court need not apply principles of statutory construction other than the rule that unambiguous statutory terms be given effect. Amicus would further argue that, even applying principles of statutory construction, Petitioner's arguments still fail, and that the courts below should be affirmed. The legislative history does not express a clear intent in conflict with the plain language of the statute itself, and therefore the

language of the statute must be regarded as conclusive. No deference is due agency interpretation clearly in conflict with the plain language of the statute.

ARGUMENT AND AUTHORITIES

A. The statutory language is plain and unambiguous, and thus, absent exceptional circumstances, this Court's inquiry is complete by review of the statutory language standing alone. The Court need not apply other principles of statutory construction.

"The starting point in statutory construction is, of course, the language of [the statute] itself." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 202, 98 S.Ct. 2279, 2305 (1978) *citing Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935 (1975). "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Com'n v. GTE Sylvania, Inc.*, 447 U.S. 107, 108, 100 S.Ct. 2051, 2056 (1980). "When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. *Ex parte Collett*, 337 U.S. 55, 61, 69 S.Ct. 944, 947, 93 L.Ed. 1207 (1949), and cases cited therein." *Tennessee Valley Authority*, 437 U.S. at 184, 98 S.Ct. at 2296. The Veterans Court and the Court of Appeals for the Federal Circuit both found the statute to be plain and unambiguous. If this Court agrees, absent exceptional circumstances, the inquiry is complete. *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 461, 107 S.Ct. 1855, 1860 (1987) *quoting Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2nd 633 (1981). Amicus believes that the language in § 1151 granting benefits if a claimant has sustained an "injury

... as the result of" VA care is conclusive, unambiguous, and does not require an inquiry into the legislative history to divine its meaning. Thus, this Court should not reach the next level of statutory construction, which is to look at the legislative history.

B. The Court, should it apply the principles of statutory construction, will find that the legislative history does not express a clear intent in conflict with the plain language of the statute and thus, the language of the statute itself must be regarded as conclusive. No deference is due agency interpretation clearly in conflict with the plain language of the statute.

At the Court of Appeals, the Secretary argued that the phrase "as the result of" is ambiguous. In its brief before this Court, the Secretary argues that the word "injury" is ambiguous because it implies fault or wrong. Amicus does not agree. If the Court should proceed to an examination of legislative history for guidance, even then the Secretary's argument fails. Absent a clear expression of legislative intention to the contrary, the language of the statute is conclusive. The Secretary concedes that "it is difficult to draw any confident conclusion about the intended scope of Section 213 on the basis of the pre-enactment legislative history alone." Petitioner's Brief at 26. On its face, therefore, Petitioner's legislative history argument cannot overcome the conclusive language of the statute.

The Secretary argues that a no-fault standard "departs sharply from common-law principles of recovery for adverse medical outcomes" prevailing at the time of the enactment of the statute. The Secretary further argues that the court of appeals "should ... have sought affirmative evidence that Congress intended to depart from the common-law norm and to relieve claimants of any burden of proof of fault--even a burden that is in fact less onerous than that routinely borne by common-law malpractice plaintiffs." Brief at 20. This

argument does not take into account the legal and historical context of the enactment of this statute. In 1924 (the time of the enactment of this legislation) there was no common law right of action against a veterans hospital for negligence or malpractice because it was barred by sovereign immunity. *See, e.g., Lynch v. United States,* 292 U.S. 571, 54 S.Ct. 840, (1934). Not until 1946, with the enactment of the Federal Tort Claims Act waiving sovereign immunity for certain negligence claims, would it have been possible to sue a federal defendant. 28 U.S.C. § 1346(b) (originally enacted as Act of Aug. 2, 1946, ch. 753, Title IV, 60 Stat. 842). The context of the enactment of the statute is not, therefore, common law *liability* at all, but the extension of *benefits* to veterans who had returned from World War I. The Act, indeed, was called "World War Veterans' Act, 1924," and provides for "*benefits* [to] be awarded in the same manner as though such disability, aggravation, or death was the result of military service during the World War." Sec. 213, World War Veterans' Act, 1924, ch. 320, 43 Stat. 623 (emphasis added). Benefits such as "pensions, compensation allowances, and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress." *Lynch v. United States*, 292 U.S. 571, 576, 54 S.Ct. 840, 842 (1934). Certainly, other kinds of veterans benefits are not based on liability, and granting benefits is not an acknowledgment of liability. An agency rule converting a statute conferring a benefit, which may be withdrawn at any time by Congress, into a liability-based compensation for negligence or accident, conflicts with the plain meaning of the statute, and introduces legal concepts completely absent from the legislation as a whole. There is a fundamental difference between death and disability benefits and compensation for accident, personal injury or malpractice.

It is more reasonable to infer from the context of the legislation and the legislative history that the intent of Congress was to provide death and disability benefits to

veterans without distinguishing between injury resulting from negligence or accident and disability or death from unspecified "hazards of medical and surgical treatment." Petitioner's Brief at 23. Providing for disability benefits in the same manner as if the disability were war-related is more analogous to *insurance* than *damages*.

The same year Congress passed the World War Veterans Act, it also attempted to repeal "all laws granting or pertaining to yearly renewable term insurance." *Lynch*, 292 U.S. at 577, 54 S.Ct. at 842. This war risk insurance provided death and disability benefits to veterans. "War risk insurance was devised in the hope that it would, in large measure, avoid the necessity of granting pensions. Term insurance was issued at a very low premium rate." *Id.* at 842. This hope failed, and the insurance scheme had run out of money. Since Congress attempted to cancel the war risk insurance program at the same time it instituted the death and disability benefits statute at issue in this appeal, it suggests not only that the benefits were considered in the context of insurance rather than personal injury liability, but that the passage of the bill took place in a context of congressional trade-offs and negotiation.

The Secretary characterizes the plain language interpretation of "injured as a result of" as a "no-fault standard ... [which] departs sharply from common-law principles of recovery for adverse medical outcomes." Brief at 19. As has been stated above, there was, in 1924, no common law negligence cause of action in which a veteran could recover against a veterans hospital. However, even analogizing to the private sector, the statute did not purport to provide no-fault *liability* for all adverse medical outcomes, but disability and death *benefits* similar to insurance provided by employers, benevolent societies, and other groups. Disability and death benefits are not normally predicated on *fault*. Nor does case law prior to 1930 suggest that such disability insurance would have been prohibitively expensive. In the 1920's, workmens' compensation insurance provided an example of a common no-fault kind of insurance, for job-

related injuries. In fact, analogizing to benefits in the private sector predicated on negligence or accident is not useful, since, in the private sector, there would have been a cause of action for the recovery of damages. It is only against governmental entities that such a cause of action was barred by sovereign immunity.

"In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 405, 102 S.Ct. 1825, 1853 (1982). In passing the Federal Tort Claims Act waiving sovereign immunity for negligence in 1946, Congress provided damages as a remedy. *Supra*. Under the World War Veterans' Act, the remedy for "injury" is death or disability payments as if the injury were service related. The basis for recovery is not the same; the remedies are not the same. There is no reason not to assume Congress meant to do precisely what it did, in the absence of a clear expression to the contrary.

The Secretary argues, however, that the language is not so clear that it can be applied without interpretation and that, therefore, its longstanding, reasonable and contemporaneous interpretation requiring a showing of negligence or accident should control. "But of course, no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 109 S.Ct. 2854, 2863 (1989).

C. Congressional inaction is not a sufficient basis for adopting an agency interpretation of a statute clearly in conflict with the plain meaning of the statutory language itself.

The Secretary finally argues that Congress ratified his interpretation by inaction. "Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Bob Jones University v. United States*, 461 U.S. 598, 600, 103 S.Ct. 2017, 2033 (1983). "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69, 66 S.Ct. 826, 830 (1946). As in *Girouard*, "The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of [the agency]." *Id.* The "silence of Congress" is not a sufficient basis for adopting an agency interpretation of statutory language clearly in conflict with its plain meaning. In fact, the omission by Congress of any requirement of fault or accident in the original statute, as well as its successors, may be more pointed than its failure to change the language. Since there was no judicial review of the Secretary's interpretation of such statutes until 1988, and since individual veterans had no private right of action, the inference from Congressional silence of ratification of the Secretary's rule deserves even less weight than the inference of Congressional ratification of court decisions from inaction. *See Girouard, supra; N.L.R.B. v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 307, 310-311, 94 S.Ct. 1757, 1779 (1974).

CONCLUSION

This Court should give meaning to the plain language of the statute and affirm the Court of Appeals and the Veterans Court finding that 38 C.F.R. Sec. 3.358(c)(3)

impermissibly imposed a fault or accident requirement in implementing 38 U.S.C. 1151 (Supp. IV 1992).

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1993

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Petitioner,

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FRED P. GARDNER
Respondent.

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BRIEF FOR AMICI CURIAE PARALYZED VETERANS OF AMERICA VETERANS OF FOREIGN WARS AMERICAN VETERANS OF WWII, KOREA AND VIETNAM BLINDED VETERANS ASSOCIATION VIETNAM VETERANS OF AMERICA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI AND SUMMARY OF ARGUMENT

The following organizations join in this brief as *amici curiae* in support of the respondent veteran, Fred P. Gardner: The Paralyzed Veterans of America; The Veterans of Foreign Wars; AMVETS (American Veterans of World War II, Korea and Vietnam); The Blinded Veterans Association; and, the Vietnam Veterans of America.[1] Each organization is composed

[1] The American Legion has acknowledged the importance of this case but is prohibited by internal regulations from joining any fellow service organization in litigation. This policy extends to Briefs Amicus Curiae.

of veterans of the Armed Forces of the United States some of whom, but for the position taken by the Department of Veterans Affairs[2], would be eligible for the same benefits claimed by Mr. Gardner. As such, each organization supports Mr. Gardner in obtaining affirmance of the decision of the Court of Appeals.

More particularly the organizations, listed in the order of joining the brief, and their interests are described as follows:

The Paralyzed Veterans of America ("PVA") is composed of over 16,000 veterans who served honorably in the armed forces of the United States or its allies and who have a spinal cord injury or disease. The Paralyzed Veterans of America is chartered by the Congress of the United States as a national association for the benefit of those veterans who have suffered injuries or disease of the spinal cord. See 36 U.S.C. § 1153 (1988). PVA has 46 chapters or subchapters in the United States and the Commonwealth of Puerto Rico.

The Veterans of Foreign Wars ("VFW") is composed of 2.2 million veterans of the armed forces of the United States who served honorably overseas in time of war and in several peacetime campaigns and a 750,000 member Ladies Auxiliary. Founded in 1899, the organization is the oldest of the major veterans service organizations and received a congressional charter in 1936. See 36 U.S.C. § 111 (1988) *et seq*. Among the purposes for which it was chartered are to assist veterans, their widows and orphans. 36 U.S.C. § 113 (1988). The VFW has over 11,000 posts located in all 50 states and a dozen foreign countries and territories. Throughout its 94 years, the VFW has been active in every effort to secure appropriate rights and privileges for America's veterans.

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[2] In 1989, the Veterans Administration was raised to cabinet level and renamed the Department of Veterans Affairs. See the Department of Veterans Affairs Act, Pub. L. 100-527, 552,10; 102 Stat. 2635. In this brief the Department will be referred to by its more commonly known acronym, the "VA".

The American Veterans of World War II, Korea and Vietnam (AMVETS) is a congressionally chartered organization of veterans and their dependents. See 36 U.S.C. § 67 (1988). As a family organization, AMVETS 200,000 members are joined in their endeavors with the members of AMVETS Auxiliary, Sons of AMVETS and Junior AMVETS who together have served the needs of the veteran for 50 years.

The 8,000 member Blinded Veterans Association (the "Association") was founded in 1945 by blinded veterans of World War II to provide for the welfare of blinded veterans and to enable these veterans to provide mutual aid and assistance to one another. The Association is chartered by the Congress of the United States. See 36 U.S.C. § 851 (1988). Services rendered by the Association include counseling to blinded veterans and their families and assistance in obtaining benefits from the Department of Veterans Affairs.

The Vietnam Veterans of America ("VVA") is a congressionally chartered organization with over 40,000 members who are veterans of the war in Vietnam. See 36 U.S.C. § 3801 (1988). These members are located in over 300 chapters and some 40 councils throughout the United States. One of the purposes of the organization is to assist disabled Vietnam-era veterans and other veterans in need of assistance in obtaining veterans benefits.

By their consolidated appearance as *amici*, these organizations wish to underscore the importance of a much broader and central issue in this case, the authority of the courts to oversee the adjudication of claims for veterans benefits, the interpretation by the VA of statutes passed by Congress which grant entitlement to those benefits, and the degree of deference due any such interpretation by the VA.

Further, this case presents the Court with its first opportunity to review the legality of the VA's pre-judicial review interpretation of veterans' benefit laws in light of the Veterans'

Judicial Review Act[3]. If this Court were to decide that *Chevron*-type[4] deference is due VA regulations promulgated before judicial review, the impact of this historic legislation will be severely limited.

The Solicitor General would have this Court reverse the decisions of both the U.S. Court of Veterans Appeals and the U.S. Court of Appeals for the Federal Circuit both which have found invalid 38 C.F.R. § 3.358(c)(3), the VA's regulatory interpretation of 38 U.S.C. § 1151 (Supp. IV 1992). In large measure the Solicitor supports his position by claiming that the decisions of the lower courts are inconsistent with the commonly accepted fault-based principles of law relating to medical malpractice, which, according to him, provided the background for Congress' enactment of Section 1151 and is consistent with the accepted principles of recovery for adverse medical outcomes. (*See e.g.* Pet. Brief at 17, 19, and 20).

The Solicitor's reliance on the common law of medical malpractice is misplaced for at least two reasons. First, the statutory scheme in which Section 1151 must be viewed is not a system to compensate the general class of persons suffering misfortune due to medical treatment — it is a statutory scheme designed to provide liberal benefits to veterans of the armed forces of the United States who have accepted the hardships of military service and have served their country in both war and peace. Second, prior to November 18, 1988, there were almost no judicial decisions regarding the validity of the VA's regulations which interpreted the laws relating to veterans benefits. Indeed, the need for such supervision of the VA's administration of veterans' benefits legislation, by an independent judicial body, was recognized by Congress when it responded to com-

[3] Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1989).

[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

plaints of the VA's abuse of its regulatory authority by repealing the non-review portions of 38 U.S.C. § 211(a) and created the U.S. Court of Veterans Appeals.

ARGUMENT

I. THE LAWS PROVIDING BENEFITS TO VETERANS OF THE ARMED FORCES SHOULD BE INTERPRETED IN A MANNER WHICH MOST BENEFITS THE VETERAN

A. Section 1151 Is Part Of A Legislative Scheme To Provide Liberal Benefits Earned Through Service To The Country In The Armed Forces Of The United States

The statute at issue must not be viewed in isolation. It is an integral part of a scheme established by Congress to recognize, through a comprehensive system of liberal benefits, the substantial contributions made by those who have served the nation honorably in its armed forces. This statutory scheme contains a full range of benefits which, among others, includes: disability compensation for service members[5]; dependency and indemnity compensation for the surviving spouse, children and parents of veterans[6]; pensions for veterans and surviving spouses[7]; free or reduced fee hospital, nursing home, domiciliary and other medical care[8]; life insurance[9]; guaranteed reemployment upon conclusion of military service[10]; education, job training, counseling and placement benefits for both veterans

[5] 38 U.S.C. §§ 1101-1163 (Supp. IV 1992).

[6] 38 U.S.C. §§ 1301-1323 (Supp. IV 1992).

[7] 38 U.S.C. §§ 1501-1562 (Supp. IV 1992).

[8] 38 U.S.C. §§ 1701-1754 (Supp. IV 1992).

[9] 38 U.S.C. §§ 1901-1988 (Supp. IV 1992).

[10] 38 U.S.C. §§ 4301-4307 (Supp. IV 1992).

and their surviving spouses and children[11]; loans for housing and small business[12]; and burial benefits[13].

Indeed this Court has recognized that these wide-ranging benefits comprise one scheme of legislation by which Congress has intended to benefit veterans. *United States v. Oregon*, 366 U.S. 643, 647 (1961) (interpreting a law which provided that the property of veterans who die in a state veterans home, intestate and without heirs, escheats to the United States rather than the State. "This natural construction we give to [this section of the law] makes it fit well into the pattern of legislation dealing with this subject. . . . The solicitude of Congress for veterans is of long standing.")

B. The Provisions Of Such Remedial Legislation Should Generally Be Liberally Interpreted In Favor Of The Beneficiary

When interpreting legislation that is remedial in nature, this Court has always given great weight to effectuating the beneficent purposes of the legislation even when faced with countervailing policies of the common law. *See, e.g. Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor*, 449 U.S. 268, 281, 283 (1980) (The Longshoremen's and Harbor Workers' Compensation Act[14] , like other workmen's compensation legislation, is a remedial statute intended to provide employees with recovery without fault, thus precluding the various common-law defenses frequently resulting in denial of recovery. The [clear] language of such a statute cannot be ignored or rewritten by the Court, even if it leads to incongruous or seemingly unjust results.);

[11] 38 U.S.C. §§ 3001-3036, 4100-4110 (Supp. IV 1992).

[12] 38 U.S.C. §§ 3701-3751 (Supp. IV 1992).

[13] 38 U.S.C. §§ 2301-2308 (Supp. IV 1992).

[14] 44 Stat. (part 2) 1424, as amended, 33 U.S.C. §§ 901-950 (1976 ed. and Supp. III).

Cox v. Roth, 348 U.S. 207, 209 (1955) ("The extreme harshness of the old common-law rule abating actions on the death of the tortfeasor flies in the face of the expressed congressional purpose to provide for 'the welfare of seamen.' The Jones Act[15] 'As welfare legislation . . . is entitled to a liberal construction to accomplish its beneficent purposes.'" Citing *Cosmopolitan Co. v. McAllister*, 337 U.S. 783, 790 (1949)); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 782 (1952) (concerning the rights of seamen under Shipping Commissioners Act of 1872,[16] "No rule of construction precludes giving a natural meaning to legislation like this that obviously is of a remedial, beneficial and amendatory character. It should be interpreted to effect its purpose."); *Cosmopolitan Co. v. McAllister*, 337 U.S. at 790 (interpreting the Jones Act and the War Shipping Administration (Clarification) Act[17] "In considering similar [welfare] legislation in other fields, we have concluded that Congress intended that the purposes of such enactments should not be restricted by common-law concepts of control so as to bar from welfare legislation as independent contractors persons who were as a matter of economic reality a part of the processes and dependent upon the businesses to which they rendered service.")

C. Legislation Designed To Benefit Veterans Is Legislation Due A Liberal Interpretation, Favoring Those Whom It Was Designed To Benefit

This Court has a consistent history of liberally interpreting legislation affecting veterans so as to provide the greatest benefit possible under the law to veterans. *See, e.g. Coffy v. Reynolds Steel Corp.*, 447 U.S. 191, 196 (1980) (regarding the Vietnam Era Veterans' Readjustment Act of 1974, § 38 U.S.C. 2021 *et seq.* "The statute is to be liberally construed for the benefit of

[15] Cited as 41 Stat. 1007, 46 U.S.C. § 688.

[16] Cited as 30 Stat. 756, 38 Stat. 1164, 46 U.S.C. § 596.

[17] Cited as 41 Stat. 1007, 46 U.S.C. § 608 and 57 Stat. 45, 50 U.S.C. App. 1291.

the returning veteran."); *United States v. Oregon*, 366 U.S. at 647 (Interpreting portions of Title 38) providing the property of veterans who die intestate and without heirs in a state veterans home becomes property of the United States to be used for the General Post fund to benefit other veterans and not of the state under its laws of intestate succession.); *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1962) ("Since legislation of this type [exempting veterans benefits from attachment] should be liberally construed [citation omitted] to protect funds granted by Congress for the maintenance and support of the beneficiaries thereof [citation omitted] we feel that deposits such as are involved here should remain inviolate."); *F.H.A. v. The Darlington*, 358 U.S. 84, 86 (1958) ("We do not think the Act[18] gave mortgagors the right to rent to transients. There is no express provision one way or the other; but the limitation seems fairly implied. We deal with legislation passed to aid veterans and their families, not with a law to promote the hotel or motel business".) *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (regarding the Selective Training and Service Act of 1940[19], "This legislation is to be liberally construed for the benefit of those who left private life to serve their country."); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("Soldiers & Sailor's Civil Relief Act[20] is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up burdens of the nation.").

For these overriding reasons, the Court should begin its analysis, not with the narrow focus on Section 1151, but with the broader view that this provision is but one piece of a broad scheme of legislation authored by the elected representatives of

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[18] The National Housing Act (cited as 56 Stat. 303, 12 U.S.C. § 1743 as amended by § 10 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 214).

[19] Cited as 54 Stat. 885, 50 U.S.C. App. § 301.

[20] Cited as 54 Stat. 1178, 1181, 50 U.S.C. App. § 521.

a grateful nation, designed to provide liberal and well deserved benefits to those who have borne the burden of military service. When viewed in this context, the Court should, consistent with its precedent interpreting other legislation benefiting veterans in particular and legislation effectuating similar remedial purposes in general, give Section 1151 a reading which most benefits its intended beneficiaries, those veterans who suffer additional disability while undergoing medical treatment provided by the VA.

II. CONDITIONING THE AWARD OF VETERANS DISABILITY BENEFITS ON THE CONCEPT OF FAULT IS INCONSISTENT WITH THE GENERAL STATUTORY SCHEME OF VETERANS BENEFITS

A. Entitlement To Veterans Disability Benefits Is Not Based Upon Concepts Of Fault; Rather, It Is Predicated Upon An Individual's Status At The Time A Disability Is Incurred

Apart from the general rule that Section 1151 should be interpreted liberally to benefit the veteran, the Court must interpret this statute in a manner consistent with the statutory scheme of determining entitlement to veterans' disability benefits.

The Solicitor would have the Court adopt the common law of negligence as its construct for analysis of this case. This would be unwise. The statutory scheme under which veterans qualify for disability benefits bears no relationship to the traditional concept of the common law of negligence which is based upon the determination of whether or not the alleged tortfeasor can be found at fault because he or she violated a legal standard of care. See Restatement (Second) of Torts §§ 298, 299A (1964). Section 1151 is not a statute designed to apportion fault for medical miscues. It, rather, defines one of the many benefits for which veterans of the armed forces may qualify.

Consequently, more properly, the Court should analyze this case under the backdrop of the basic entitlement to scheme of disability benefits administered by the VA. Such entitlement has no fault element. Entitlement is, rather, temporal in nature, predicated solely upon a finding that a veteran has a disability and that disability resulted from an injury or disease that either first occurred during a qualifying period of military service or was aggravated during such service. 38 U.S.C. §§ 1110, 1131 (Supp. IV 1992). The law does not require a causal link between the injury or disease and the veteran's military duties, but only that the injury or disease occurred during a period of qualifying service. *Walters v. Nat. Ass'n. of Radiation Survivors*, 473 U.S. 305, 307 (1985). See *also Browder v. Derwinski*, 1 Vet. App. 204, 207 (1991); *Laposky v. Brown*, 4 Vet. App. 331, 334 (1993).

It is upon this basic foundation that the law of VA disability benefit entitlement is built. In effect, Congress has recognized what so many Americans believe and this Court has approved, that veterans have been obligated to drop their own affairs and take up the burden of the nation, subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life. As a result, our country has a long-standing policy of compensating veterans for their past contributions by providing them with numerous advantages. This Court has found this policy to be legitimate. See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 551 (1983), citing other cases.

Consequently, the decisions below, which held that the VA's infusion of the element of fault into its adjudication of claims filed under Section 1151 violates the law, are entirely consistent with the statutory scheme enacted by Congress to compensate veterans for their many past contributions.

B. The VA Itself Has Represented To Congress That, Prior To 1988, It Did Not Utilize Procedures Consistent With The Traditional Legal Principles Of Medical Malpractice To Adjudicate Claims For Veterans Benefits

In describing the VA adjudication system before the Senate Committee on Veterans' Affairs in 1988, the VA General Counsel noted the liberal due process protections provided to the veteran in the adjudication of benefit claims. The General Counsel cited the availability of multiple administrative reviews, agency assistance in obtaining evidence, advice given by the agency regarding the laws and regulations pertinent to the veteran's claim, and oral hearings on demand as examples of the liberal treatment given to the veteran seeking benefits. *Judicial Review Legislation: Hearing Before the Senate Comm. On Veterans' Affairs On S. 11, the Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act*, S. Hrg. No. 938, 100th Congr., 2d Sess. 492 (1988) (statement of Donald L. Ivers, General Counsel, Veterans Administration).

Moreover, the General Counsel specifically denied the VA's use of such traditional hallmarks of malpractice adjudication as the consideration of evidence outside the VA file, consideration of consultative opinions or scientific treatises or medical journal articles bearing to the issue, and assessments of credibility of persons giving evidence to the VA. *Id.* at 494.

In summary, the VA General Counsel stated, "We are unaware of any administrative process operated by any other Federal agency that is more pro-claimant, simpler to use, or more equitable" and "the present system is informal and assistive. It works for veterans, it works with veterans, and is monitored by veterans. So uniquely beneficent a system should not be jeopardized for the philosophical end of guaranteeing a few unsuccessful claimants the opportunity of having their

claims again considered — and probably denied — in a court of law." Id. at 493 and 502.

As the VA General Counsel himself testified, the statutory scheme in which Section 1151 arises is one designed to provide every assistance to a veteran seeking to establish his or her entitlement to a benefit earned by virtue of service to their country, and is not one designed to place upon the veteran the difficult burden of establishing the presence of negligence or other fault.

III. THE INTERPRETATION OF SECTION 1151 BY THE VA IS DUE NO DEFERENCE

A. Prior To 1988, This Court Recognized That The VA Was Due Deference In Interpreting The Laws Relating To Veterans Benefits

Before 1988, Congress (and the Courts) were content to permit the VA to provide virtually unreviewable, and thus supremely authoritative, interpretations of the laws governing benefits for veterans. Prior to that year, 38 U.S.C. § 211(a) prohibited judicial review of matters relating to veterans benefits.[21] The VA asserted and the Court recognized two primary reasons for such preclusion:

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[21] Prior to November 18, 1988, 38 U.S.C. § 211(a) read in pertinent part:

> § 211. Decisions by Administrator; opinions of Attorney General
>
> (a) (1) The Administrator shall decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans. Subject to paragraph (2) of this subsection, the decision of the Administrator as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.
>
> (2) The second sentence of paragraph (1) of this subsection does not apply to —

Section 211 was repealed by P.L. 102-83, § 2(a), 105 Stat. 378 but has been recast as 38 U.S.C. § 511 (Supp. IV 1992).

> Court acknowledges VA's assertion of two primary purposes of the no-review clause in 38 U.S.C. § 211(a) to be: "(1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation, and (2) to insure that the technical and complex determinations and applications of the Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made.

Johnson v. Robison, 415 U.S. 361, 370 (1974).

B. After 1988 And The Passage Of The Veterans' Judicial Review Act, The VA's Interpretation Of The Laws Relating To Veterans' Benefits Should No Longer Be Given Deference

On November 18, 1988, the Veterans' Judicial Review Act[22] (hereinafter "VJRA") became law, eliminating the no-review provisions of 38 U.S.C. § 211(a) regarding the VA's decisions on veterans benefits.[23] The new law also specifically made the VA subject to the rulemaking provisions of the Administrative Procedure Act. This action by Congress ended some 170 years of total independence by the VA (and its predecessor agencies) in interpreting the laws providing benefits to veterans and the procedures and interpretations used to adjudicate claims for those benefits. H.R. Rep. No. 963, 100th Cong., 2d Sess. (1988), *reprinted in* U.S. Code Cong. & Admin. News 5782. Such action did not come without substantial investigation and debate.[24]

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[22] Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1989).

[23] The VJRA added to the exclusions contained in subsection (2) decisions regarding the award of disability and other benefits.

[24] *See generally Judicial Review Legislation: Hearing on S. 11, The Proposed Veterans Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act Before the Comm. on Veterans' Affairs of the United States Senate*, 100th Cong., 2d Sess.

(8)

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IN THE
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OCTOBER TERM, 1994

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
Petitioner,
v.
FRED P. GARDNER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR THE NATIONAL VETERANS LEGAL SERVICES PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

A federal statute initially enacted in 1924 as part of the World War Veterans Act, 43 Stat. 607, provides disability compensation to veterans injured as a result of medical or surgical treatment administered by Department of Veterans Affairs ("VA") personnel:

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of . . . medical or surgical treatment . . . and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to . . . such veteran, disability or death compensation under this chapter . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

38 U.S.C. § 1151 (1991 & Supp. IV 1994). A VA regulation limits compensation under the statute to cases in which the additional disability resulted from an "accident" or "carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of the VA. 38 C.F.R. § 3.358(c)(3) (1993).

The question in this case is whether the courts below were correct in striking down the VA regulation because its accident/fault limitation is inconsistent with the statute's plain language, which imposes no such restrictions on veterans' right to compensation.

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BRIEF FOR THE NATIONAL VETERANS LEGAL SERVICES PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF *AMICUS CURIAE*

The National Veterans Legal Services Project ("NVLSP") is a non-profit, tax-exempt organization which serves as a national support center in the area of veterans law, including disability compensation cases. The NVLSP regularly represents veterans before the Board of Veterans Appeals, the United States Court of Veterans Appeals ("COVA") and the United States Court of Appeals for the Federal Circuit. The NVLSP also publishes informational materials for veterans and their advocates and conducts training events for veterans advocates. The services of the NVLSP are provided to individual veterans and classes of veterans service organi-

zations, state and county veterans offices, community-based veterans organizations, volunteer attorneys, private bar attorneys, legal services attorneys, and other veterans advocates nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question raised in this case is narrow and straightforward: whether a regulation of the Department of Veterans Affairs ("VA"), 38 C.F.R. § 3.358(c)(3) (1993), is inconsistent with the statute it purports to implement, 38 U.S.C. § 1151 (1993).

Section 1151 provides, in relevant part, that:

> Where any veteran shall have suffered an injury or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation . . . awarded under any of the laws administered by the Secretary. . . . not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

38 U.S.C. § 1151 (1991).[1] Thus, Section 1151 expressly sets forth four requirements for compensation:

(1) "an injury, or aggravation of an injury;"

[1] The predecessor of Section 1151 was Section 213 of the World War Veterans Act, 1924, ch. 320, 43 Stat. 607, 623. In 1933, Congress repealed the statute, Economy Act of March 20, 1933, ch. 3, tit. I, § 17, 48 Stat. 8, 11, but reenacted it in substantially similar form in 1934, Section 31 of the Act of March 28, 1934, ch. 102, tit. III, 48 Stat. 509, 526, formerly codified at 38 U.S.C. § 501a (1952). The 1934 enactment was recodified at 38 U.S.C. § 351 in 1958, Act of Sept. 2, 1958, Pub. L. No. 85-857, 72 Stat. 1105, 1124, which was redesignated Section 1151 in 1991. Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 5, 105 Stat. 378, 406 (1991). For ease of reference, unless otherwise specified, we will refer to the statute throughout this brief as "Section 1151."

(2) "as the result of [VA] hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation;"

(3) "not the result of such veteran's own willful misconduct;" and

(4) the "injury or aggravation results in additional disability to or the death of such veteran."

If these four requirements are met, the statute commands that "compensation *shall* be awarded in the same manner as if such disability, aggravation, or death were service-connected." *Id.* (emphasis supplied). Congress specified no other limitations or requirements beyond these four.

VA's interpretation of this statute appears at 38 C.F.R. § 3.358 (1993). After summarizing the statutory language and listing the criteria that govern a determination of whether a veteran has incurred additional disability, the regulation sets forth, at subsection (c), requirements applicable to a determination of the cause of any additional disability. Subsection (c)(3) provides that:

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of [VA]. However, compensation is payable in the event of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from [VA] hospitalization or medical or surgical care.

38 C.F.R. § 3.358(c)(3) (1993). At the center of the instant controversy is the requirement of the VA regulation that, to obtain compensation, a veteran must prove that his or her additional disability resulted from an "accident" or "carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of VA. 38 C.F.R. § 3.358(c)(3) (1993).

Fairly read, there is nothing in the plain language of Section 1151 and its four requirements to indicate that Congress intended to require, as a predicate for benefits under that provision, a showing of an "accident" or "carelessness," "negligence" or "fault" on the part of the VA. None of those terms appear on the face of the statute. By contrast, the statute does expressly address fault on the part of the veteran, explicitly precluding compensation to veterans whose disability is the result of their "own willful misconduct." "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Application of this principle in this case is reinforced by the fact that, both prior and subsequent to 1924 (when the predecessor to Section 1151 was enacted), when Congress has intended to impose a fault-based system of liability in other contexts, it has done so explicitly by using terms such as "negligence." See, *e.g.*, Federal Employers' Liability Act, 45 U.S.C. § 51 (1986); Federal Tort Claims Act, 28 U.S.C. §§ 2672, 2674 (1986); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) (1986). If Congress had wanted to impose VA fault as a predicate for compensation under Section 1151, it could have and would have done so. However, it did not.

Notwithstanding these circumstances, the Secretary argues that five words in Section 1151—"injury" and "as a result of"—potentially carry some connotation of fault or, at very least, create some interpretive ambiguity. These arguments are demonstrably meritless.

The Secretary's argument with respect to the term "injury" would require this Court to find that Congress intended the term to have two different meanings within

the same sentence of Section 1151. Section 1151 commences with the phrase: "Where any veteran shall have suffered an injury, or an aggravation of an injury . . ." The Secretary concedes that the phrase "aggravation of an injury" relates to a veteran's condition prior to any VA treatment at issue and thus carries with it no connotation of fault. Pet. Br. 15 n.8. The Secretary's argument that Congress intended to impose a fault-based compensation system when it employed the term "injury" six words earlier in the same sentence, flatly violates the principle that, when identical words appear in different parts of the same act, they are intended to have the same meaning. The Secretary can point to nothing in the statute indicating that Congress intended to deviate from this familiar principle.

The Secretary's argument that the phrase "as a result of" may create a fault-based compensation system is equally flawed. As the court of appeals correctly found, read literally, the words "as a result of" create merely a *causation* requirement. Indeed, the VA's own regulations (38 C.F.R. § 3.358(c)(6) (1993))—which require *no* showing of fault in connection with an injury "resulting from . . . the pursuit of vocational rehabilitation"—demonstrate that not even the VA believes in this argument.

Further, the Secretary's argument that the terms "injury" or "as a result of" imply a fault-based compensation system under Section 1151 is also belied by the fact that nearly identical terms appear in the veterans compensation provisions applicable to service-connected disability (38 U.S.C. §§ 1110, 1131 (1991)), as to which the Secretary concedes a *no*-fault system applies. Congress could have stated explicitly that a different compensation system was to apply under Section 1151 to compensation for non-service-connected conditions. It did not. To the contrary, it stated that compensation under Section 1151 "shall be awarded in the same manner as if such disability, aggravation, or death were service-connected."

Finally, the simple and straight-forward language of the statute is reinforced by the overall structure of the statutory scheme of veterans benefits. As this Court described in detail in *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), Congress intended the VA benefits system to be nonadversarial and informal—a system totally at odds with the adversarial and formal fault-based system that the Secretary claims can be read into Section 1151.

Notwithstanding the plain language of Section 1151, the Secretary advances four arguments in support of his claim that Congress intended a fault-based system in enacting the statute. The Secretary argues that (1) the legislative history surrounding the enactment of Section 1151, (2) the VA's purportedly contemporaneous interpretation of the statute shortly after its enactment, (3) the reenactment of the statute in 1934, and (4) congressional silence on the issue subsequent to 1934, all support the VA's fault-based regulation. None of the factors asserted by the Secretary, however, justifies ignoring the plain meaning of the statute.

The Secretary asserts that the legislative history surrounding the enactment of Section 1151 supports the conclusion that Congress intended to impose a fault-based system. As the Secretary concedes, however, at least some of the legislative history directly supports the conclusion that Congress never intended to impose on injured veterans the burden of proving VA fault or negligence. Under these circumstances, the Secretary has not made the "extraordinary showing of contrary intentions. . . [that] would justify" ignoring the plain language of the statute. *Garcia* v. *United States*, 469 U.S. 70, 75 (1984).

The Secretary next argues that VA's interpretation of Section 1151 should be given considerable weight because it was made contemporaneously with the enactment of the statute in 1924. To the contrary, the initial decisions to come out of the VA field offices in the two years following enactment of the statute were consistent with the notion that fault was *not* an element of a claim for benefits. Further, the VA General Counsel opinions and VA regulations that followed these initial decisions show a pattern of varied interpretation and inconsistent application and, accordingly, do not provide any basis for modifying or ignoring the language of the statute.

For similar reasons, the Secretary's argument that the 1934 reenactment of Section 1151 represented Congress' implicit endorsement of the VA's fault requirement is also baseless. To begin with, there is nothing to indicate that Congress actually considered the fault/no fault issue in 1934. Moreover, given the inconsistency of the VA's interpretations in the prior decade, it cannot be said that there was any "uniform construction which Congress might have endorsed." *Fogerty* v. *Fantasy, Inc.*, 114 S. Ct. 1023, 1032 (1994).

Finally, the Secretary urges this Court to find that Congress acquiesced to the VA's interpretation because it remained silent on the fault/no fault issue when it amended the statute subsequent to 1934. As this Court has recently held, these types of acquiescence arguments "deserve little weight in the interpretive process." *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1453 (1994). This principle clearly applies here where the Secretary offers no evidence from which to conclude that Congress ever considered the VA's regulation in the process of amending the statute.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE PRECLUDES IMPOSITION OF A "FAULT" OR "ACCIDENT" REQUIREMENT AS A PREDICATE FOR BENEFITS.

A. "The starting point in interpreting a statute is its language, for 'if the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2157 (1993) (quoting *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)); see also *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989). In order to derive the statute's plain meaning, the court must examine the specific language at issue and the overall structure of the statute. *Bethesda Hosp. Ass'n* v. *Bowen*, 485 U.S. 399, 403-05 (1988).

Section 1151 commands that compensation "shall be awarded in the same manner" as compensation is awarded for service-connected disabilities [2] if the four requirements (*i.e.*, injury, caused by VA treatment, not due to veteran's fault, and resulting in disability or death) are met. The specific language of Section 1151 does not contain even the faintest hint of a legislative expression that fault by VA personnel or an accident is a prerequisite to obtaining compensation for additional disability. Indeed, while arguing that Congress meant to create a fault-based system in this very litigation, the Secretary previously conceded that Section 1151 on its face does *not* include the "fault" or "accident" requirement imposed by the regulation. See Appellee's Response to

[2] "Service-connected disabilities" refer to disabilities incurred during, or as a result of, an individual's military service. Injury caused by VA treatment for such disabilities is compensable under provisions other than Section 1151. *See* 38 U.S.C. §§ 1110, 1131 (1991). Section 1151 provides identical compensation for veterans disabilities due to VA treatment for conditions *not* attributable to, or incurred during, active military service.

Order of the Court to File a Supplemental Memorandum, COVA No. 90-120, at 8-9 (Vet. App. filed Feb. 25, 1991) ("the plain language of that provision would suggest" that Congress intended to "authorize the payment of compensation for a veteran's additional disability arising from *any* unfortunate circumstance arising during hospitalization") (emphasis in original). See also VA General Counsel's Op. No. 99-90 (Dec. 24, 1990), J.A. 41 ("literal" interpretation would require "strict liability"). In short, the plain language of Section 1151 provides no authority for the VA fault or accident requirement that the VA engrafted through its implementing regulation. Since an agency cannot, under the rubric of regulation, restrict the scope of a statute, *Neuberger* v. *Commissioner*, 311 U.S. 83, 89 (1940), the Secretary's regulation requiring the veteran to prove fault or accident is invalid. *Chevron, U.S.A., Inc.*, v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (where the plain meaning of the statute conflicts with the administrative regulation, the regulation is invalid).

The plain language of the statute demonstrates that Congress considered and expressly addressed the issue of fault and that omission of VA fault in the statute's language is no oversight. The statute addresses the issue of fault, but only by restricting the universe of veterans who may seek compensation to those whose additional disability is not the result of their "own willful misconduct." 38 U.S.C. § 1151 (1991). The fact that Congress inserted this limitation shows that Congress considered the issue of fault while drafting the statute and determined that, although fault of the veteran was relevant to a determination of eligibility for compensation, the fault of VA personnel in causing the injury was not.

There is no basis for assuming that Congress overlooked a requirement of fault on the part of the VA or intended to imply such a requirement where it carefully crafted the exclusion to compensation based on the

"willful misconduct" of the veteran. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983); see also *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Thus, in this case, Congress is presumed to know what it was doing when it barred recovery for the veteran's willful misconduct but indicated no other element of fault.

This conclusion is reinforced by the fact that when Congress has intended to impose a fault-based system of liability in other contexts, it has done so explicitly. See, *e.g.*, Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 (1986) (enacted in 1908 and providing that "every common carrier by railroad . . . shall be liable in damages to any person suffering injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment"); Jones Act, 46 U.S.C. § 688 (1975) (enacted in 1920 and providing a cause of action for damages to "any seaman" injured "in the course of his employment" in the same manner as in "cases of personal injury to railway employees" under FELA); Federal Tort Claims Act, 28 U.S.C. § 2672 (1986) (enacted in 1948 and providing for administrative adjustment of claims against the United States for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the government"); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) (1986) (enacted in 1972 and providing that "[i]n the event of injury to a person covered under this Chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party"); Act for the Better Security of Life on Board of Vessels, 46 U.S.C. § 491 (1958) (enacted in 1871 and providing that "any person sustaining loss or injury through the carelessness, negligence, or willful misconduct of any master, mate, engineer, or pilot" may sue those individuals and "recover damages for any such injury").

In short, Congress knew how to impose a fault-based compensation standard when it chose to do so. If, as the Secretary claims, Congress intended to limit veterans benefits to instances involving an "accident" or VA "fault," "carelessness" or "negligence," it would have used those words in the statutory text. See *Central Bank*, 114 S. Ct. at 1448; *Pinter* v. *Dahl*, 486 U.S. 622, 650 (1988). But, it did not.

B. In his brief to this Court, the Secretary argues—for the first time—that the term "injury" may carry with it some connotation of fault. Pet. Br. 13-16. The Secretary's failure to raise this argument previously is easily understood: his argument would require the Court to hold that Congress intended the word "injury" to have two different meanings within the *same sentence* contained in Section 1151.

Section 1151 begins with the phrase: "where any veteran shall have suffered an injury, or an aggravation of an injury . . ." As the Secretary concedes (Pet. Br. 15 n.8), the phrase "aggravation of an injury" relates to a veteran's condition prior to treatment and thus carries with it *no* requirement of fault. Yet, the Secretary argues that, when Congress employed the term "injury" six words earlier, it intended to impose a fault-based compensation system. The Secretary cannot cite to anything in the statute that supports this newly asserted interpretation. To the contrary, this Court has made clear that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986); see also *Morrison-Knudsen Const. Co.* v. *Director*, 461 U.S. 624, 633 (1983) (same). *A fortiori*, this familiar prin-

ciple of statutory construction applies when "identical words" are used twice in the same sentence.

The Secretary next argues (Pet. Br. 16-20) that the phrase "as the result of" may also carry some connotation of fault. Again, however, the Secretary points to nothing else in the statute which supports the claim that the phrase is meant to introduce fault into the statutory scheme. To the contrary, as the court of appeals correctly observed, the phrase—literally read—creates only a *causation* requirement. Pet. App. 8a.

The soundness of the court of appeals' conclusion—in contrast to the Secretary's proposed interpretation—is squarely supported by reading the phrase "as a result of" in its full statutory context. See *King* v. *St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) ("meaning of statutory language, plain or not, depends on context"). Section 1151 addresses an injury or an aggravation of an injury "as a result of" four circumstances: "hospitalization, medical or surgical treatment, or the pursuit of vocational rehabilitation. . . ." If the phrase "as a result of" was meant to introduce VA fault into Section 1151, that fault requirement would apply to *all four* circumstances, including "pursuit of vocational rehabilitation." However, if a showing of VA fault were being required, Congress would not have referred to "the *pursuit* [by the veteran] of vocational rehabilitation" but rather to "the *provision* [by the VA] of vocational rehabilitation." Indeed, the VA's regulations make clear that the Secretary does *not* apply a fault requirement with respect to an injury "as a result of . . . the pursuit of a course of vocational rehabilitation," but requires only causal connection between vocational rehabilitation and the veteran's injury. See 38 C.F.R. § 3.358(c)(6) (1993) ("compensation for disability resulting from the pursuit of vocational rehabilitation is not payable unless there is established a direct (proximate) causal connection between the injury or aggravation of an existing injury and some

essential activity or function which is within the scope of the vocational rehabilitation course"). See also 36 Op. Att'y Gen. 61 (1929) (compensation for injury incurred while in vocational training requires only showing causation similar to application of Workmen's Compensation Acts).[8]

Moreover, the Secretary's argument that the terms "injury" or "as a result of" imply a fault-based compensation system under Section 1151 is also belied by the fact that similar terms appear in connection with other veterans compensation provisions as to which the Secretary concedes a no-fault system applies. The VA administers two major disability benefits programs for veterans. The first program is designed to compensate veterans who were injured while in the service. Such benefits are often referred to as "service-connected" benefits. See 38 U.S.C. §§ 1110, 1131 (1991). Section 1110 provides a guarantee of compensation to active military personnel for "disability *resulting* from personal *injury* suffered or disease contracted in line of duty . . . during a period of war." (Emphasis supplied.) Similarly, Section 1131 provides a guarantee of compensation for active military personnel for "disability *resulting* from personal *injury* suffered . . . during other than a period of war." (Emphasis supplied.) The second program—the one involved in this case—is designed to provide benefits to veterans no longer in service who are injured as a result of VA medical treatment, vocational rehabilitation, or hospitalization. 38 U.S.C. § 1151 (1991). This program covers treatment for non-service-connected conditions. Under Section 1151, benefits are

[8] The Secretary makes much ado about a statement by the respondent that "[s]ection 1151 would not provide benefits for an amputation necessary to remove a gangrenous leg." Pet. Br. 17-18. The respondent's common sense application of Section 1151 to this hypothetical in no way vindicates the "fault" or "accident" requirement of the VA's regulation. Compensation under Section 1151 would not be appropriate in this hypothetical because the loss of the leg was not merely a reasonably foreseeable risk—but the *intended consequence* of the surgical procedure.

"awarded in the same manner as if such disability . . . were service-connected." These benefits are sometimes referred to as "quasi-service-connected benefits."

Although both Sections 1110 and 1131—similar to Section 1151—contain the allegedly ambiguous words "injury" and "resulting," the Secretary concedes that, under these statutes, a veteran who suffers a surgical injury for treatment of a service-connected condition receives compensation *without* proof of fault. Pet. Br. 8 n.3. See 38 C.F.R. § 3.310(a) (1993). In an attempt to justify his disparate interpretation of similarly structured statutes, the Secretary argues:

> The basic premise of compensation for service-connected disabilities is that the government will assume responsibility for conditions contracted by service members "in line of duty." . . . Compensation under Section 1151, on the other hand, is not based on a general assumption of national responsibility for the veteran's underlying condition, but on some specific connection between treatment rendered by the VA and a post-treatment disability. It is not surprising that Congress would require a showing of fault or "accident" before assuming responsibility for the latter class of cases.

Pet. Br. 15 n.8.

However, once again there is no authority—nor does the Secretary refer to any—which supports even an inference that Congress had this distinction in mind in 1924 or at any time in reeancting Section 1151. Rather, even the Secretary's own General Counsel has stated that Congress did *not* intend a distinction between recipients of so-called "quasi-service-connected" benefits under Section 1151 and recipients of benefits under Section 1110 and 1131. VA General Counsel's Op. No. 80-90 (July 18, 1990), J.A. 24.[4]

[4] Before the Court of Veterans Appeals, the Secretary argued that applying the same no-fault standard to both service-connected benefits (under Sections 1110 and 1131) and quasi-service-connected benefits (under Section 1151) would lead to absurd results. The Secretary apparently has abandoned this argument in this Court—with good reason. The circumstances of Section 1151 beneficiaries can often be virtually identical to beneficiaries under Sections 1110 or 1131. As the Secretary notes (Pet. Br. 15 n.8), in defining what constitutes "line of duty" under either Section 1110 or 1131, Congress has required only a temporal relationship between duty status and the onset of a condition. *See* 38 U.S.C. § 105 (1991). Thus, for example, if Mr. Gardner—while on active duty but on leave—had been injured while surfing in Hawaii and suffered a herniated disc, any "bad result" of the subsequent in-service or post-service surgery would be treated as service-connected and compensated on a no-fault basis.

Prior to 1924, a veteran treated for a service-connected condition could obtain compensation for any surgical injury that resulted without proof of fault. With the 1924 Act, Congress simply put the veteran who suffered disability or death from VA treatment for a non-service-connected condition on a par with the veteran who suffered disability or death from a service-connected condition. Rather than incorporating the common law or any other fault-based system, Congress merely extended the no-fault compensation system already applicable to service-connected disabilities. If Congress had intended to preclude payments under Section 1151 in the absence of fault or "accident," it would have expressed recognition of the inconsistency in the standards applicable in these veterans benefit provisions by specifically imposing a fault requirement. Thus, the "context of this statute actually supports the conclusion that Congress meant what [Section 1151] says." *Conroy* v. *Aniskoff*, 113 S. Ct. 1562, 1565 (1993).

C. The Secretary further argues that his "view that the statute requires legal causation is also consistent with the common law of medical malpractice" and that the "no-fault standard advocated by respondent and the court of appeals, on the other hand, departs sharply from the common-law principles of recovery for adverse medical

outcomes." Pet. Br. 19. The Secretary's argument *assumes*—again without citing any support from the statute—that Congress intended to adopt a common-law liability standard in enacting Section 1151 and its predecessors. To the contrary, Section 1151 expressly states that if its four requirements are met, compensation "shall be awarded in the same manner as if such disability . . . were service-connected." As just described, compensation for service-connected conditions is *not* governed by a fault-based or common law system, but is awarded on a no-fault basis. Where Congress wished to incorporate a common law fault standard, such as under FELA, it knew how to do so. In Section 1151, however, Congress expressly determined *not* to adopt the common law as its model, but instead to adopt the already existing statutory scheme of compensation for service-connected disabilities.

Moreover, the Secretary's argument that Congress intended to adopt a fault-based system linked to the common law in enacting Section 1151 also conflicts with the overall statutory scheme governing the provision of veterans benefits. The adjudication of claims for benefits (under Sections 1110, 1131 *and* 1151) is designed to be both informal and nonadversarial. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 323-24 (1985);[5] see also *Littke* v. *Derwinski*, 1 Vet. App. 90, 91 (1990) ("VA takes pride in operating a system of processing and adjudicating claims for benefits that is both informal and nonadversarial"). Congress designed the adjudicatory system for veterans benefits to be solicitous of veterans' welfare and not to impose substantial or complex evidentiary burdens on the veterans. The adjudicatory system set up by Congress, including claims filed under

[5] In *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), this Court held that a $10 cap on attorney's fees for cases brought before the regional boards did not violate the First Amendment or the Due Process Clause. The Court found the limitation on fees to be consistent with a system characterized as both "informal and nonadversarial." 473 U.S. at 323.

Section 1151, is not at all consistent with the fault-based system that the Secretary claims is created under that statute.

The claims process is commenced by the filing of a claim form by the veteran at one of the VA's regional offices. 38 U.S.C. §§ 5101-5103 (1991). In most cases, the claim is referred to a regional rating board, usually comprised of three people, including a medical specialist. Hearings before the regional rating boards are "ex parte in nature," 38 C.F.R. § 3.103(a) (1993), and "no Government official appears in opposition." *Walters*, 473 U.S. at 309-10. In fact, in most cases, recovery of benefits is "swift [and] efficient," *Stencel Aero Eng'g Corp.* v. *United States*, 431 U.S. 666, 673 (1977), and "normally requires no litigation." *Feres* v. *United States*, 340 U.S. 135, 145 (1950). This is consistent with the notion that the whole claims process operates under a congressionally created umbrella of paternalistic concern for this country's veterans. *Walters*, 473 U.S. at 323-24.

The VA has certain duties and obligations designed to enable the veteran to effectively present his claim. First, the VA has the duty to assist any claimant who has submitted a well-grounded claim in developing the facts pertinent to his claim. *Littke*, 1 Vet. App. at 91. This duty to assist is neither optional nor discretionary and requires the VA to conduct a thorough and contemporaneous medical evaluation, *Green* v. *Derwinski*, 1 Vet. App. 121, 124 (1991), order a medical examination by a specialist, if required, *Hyder* v. *Derwinski*, 1 Vet. App. 221, 224 (1991), procure relevant medical records from private physicians, *Littke*, 1 Vet. App. at 92, and obtain all relevant records in the possession of any federal department or agency. *Id.* Second, the VA is required to apply a broad and liberal interpretation to its rules, 38 C.F.R. § 3.03(a) (1993), and to infer issues or claims not expressly raised by the claimant. *Akles* v. *Derwinski*, 1 Vet. App. 118, 121 (1991). Finally, the "board

is directed by regulation to resolve all reasonable doubts in favor of the claimant." *Walters*, 473 U.S. at 310; see also *Gilbert* v. *Derwinski*, 1 Vet. App. 49, 54 (1990) (claimant prevails where "there is an approximate balance of positive and negative evidence").

If the board issues an unfavorable opinion for the veteran, he or she may file a notice of disagreement with the regional office. If upon reconsideration the regional office adheres to the original decision, the agency must issue a "statement of the case" which contains a summary of the evidence, the applicable law and regulations upon which the decision was based, and the reasons for the denial of the claim. See 38 U.S.C. § 7105(d) (1991). The claimant may then appeal to the Board of Veterans Appeals ("BVA"). The hearings in front of the BVA "are [also] ex parte, there is no formal questioning or cross-examination, and no formal rules of evidence apply." *Walters*, 473 U.S. at 311. Indeed, since there is no formal *res judicata* effect or statute of limitations, the appellant may argue new theories of entitlement and present claims for different benefits up until the time the BVA makes its final decision. *Myers* v. *Derwinski*, 1 Vet. App. 127, 129 (1991).

The fault-based standard the Secretary claims is part of Section 1151 is clearly incompatible with the informal and nonadversarial adjudicatory system created under that statute. It is inconceivable that Congress would have combined a VA fault requirement, which inherently would impose a heavy and complex evidentiary burden on legally untutored veterans, with a system in which a veteran was forbidden to pay an attorney more than $10. Certainly, given the informal and nonadversarial statutory scheme for veterans benefits, in the absence of an explicit indication from Congress that it was imposing a fault-based system, none should be inferred.[6]

[6] The Secretary's argument that Congress intended to create a fault-based system in enacting Section 1151 is also belied by the enactment of the Federal Tort Claims Act ("FTCA"). The FTCA was not enacted until 1946 (60 Stat. 842, 843 (1946) (codified at 28 U.S.C. §§ 1346(b), 2671 *et seq.* (1982))). Subsequently, Congress made clear that the FTCA was the *exclusive* remedy for malpractice actions against the VA. 38 U.S.C. § 7316(a)(1)(B) (1991 & Supp. IV 1994). The exclusivity of the FTCA regime as a tort-based remedy against the VA further suggests that Section 1151 does not include a fault-based standard.

II. EACH OF THE THEORIES ADVANCED BY VA FOR IGNORING THE PLAIN MEANING OF SECTION 1151 IS MERITLESS.

As demonstrated above, the "statutory command of § [1151] is unambiguous, unequivocal, and unlimited." *Conroy* v. *Aniskoff*, 113 S. Ct. 1562, 1564 (1993). Since this is the case, "judicial inquiry is complete, except in 'rare and exceptional circumstances.'" *Rubin* v. *United States*, 449 U.S. 424 (1981) (quoting *TVA* v. *Hill*, 437 U.S. 153, 187 n.33 (1978)). The Secretary attempts to skirt around the plain meaning of the statute by asserting that (1) the legislative history surrounding the enactment of Section 1151, (2) purportedly contemporaneous interpretations of the statute by the VA, (3) subsequent reenactment of the statute, and (4) congressional silence on the issue after 1934 all support a conclusion that Congress contemplated a fault-based system in enacting Section 1151. None of the theories advanced by the government changes the plain language of the statute or permits that language to be ignored or modified.[7]

[7] Additionally, the Secretary attempts to find support for his argument with vague references to policy considerations. *E.g.*, Pet. Br. 15 n.8, 18-19, 41. The Court has made clear that such arguments "cannot override [our] interpretation of the Act's text and structure," except to the extent that they might help to show that "adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it." *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1442 (1994) (quoting *Demarest* v. *Manspeaker*, 498 U.S. 184, 191 (1991)). The Secretary has apparently abandoned his prior argument that a no-fault interpretation of Section 1151 would lead to impermissibly absurd results. *See supra* note 3.

A. Although this Court may "turn to the legislative history as an additional tool of analysis, [it does] so with the recognition that only the most extraordinary showing of contrary intentions from [the] data would justify a limitation on the 'plain meaning' of the statutory language." *Garcia* v. *United States*, 469 U.S. 70, 75 (1984); see also *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (indicating that where there is no "clearly expressed legislative intention to the contrary," the words of the statute "must ordinarily be regarded as conclusive"). Although, as the court of appeals recognized, " 'recourse to the legislative history of Section 1151 is unnecessary in light of the plain meaning of the statutory text' " (Pet. App. 9a) (quoting *Darby* v. *Cisneros*, 113 S. Ct. 2539, 2545 (1993)), the legislative history of the 1924 Act reinforces the plain language in Section 1151. See *United States* v. *James*, 478 U.S. 597, 606 (1986).

Section 213 of the World War Veterans Act, 1924, ch. 320, 43 Stat. 607, is the predecessor of Section 1151. Section 213, designed to be remedial legislation, was presented as a bill to amend the War Risk Insurance Act. *Hearings Before the House Committee on World War Veterans' Legislation*, 68th Cong., 1st Sess. 113 (1924) ("1924 Hearings"). As an initial matter, the fact that the statute was part of an insurance scheme supports the conclusion that Congress did not intend for veterans to prove an element of a fault in order to receive Section 1151 benefits.

The comments of General Frank T. Hines, Director of the Veterans Bureau from 1923 until 1945, are instructive. In introducing the legislation, he stated:

> [I]t seems to me manifestly unjust, that in good faith the man undergoes an operation, *the doctor does the best he can and without neglect* . . . [w]ith the best medical advice, and still at the end of a certain period we find the man has a greater disability than he originally started with, and we have no way of correcting in any measure that condition.

1924 Hearings at 114 (emphasis supplied). Similarly, in a letter to the Chairman of the Committee, General Hines wrote:

> I concur in the principle that authority should exist for compensating the cases of disability due to the hazards of training upon the general theory and principle of the workmen's compensation act. I would extend the principle beyond this particular proposal to include also ratable disabilities *incurred without fault and due to the hazards of medical and surgical treatment.*

Id. at 122 (emphasis supplied). The whole compensation scheme rests upon the notion that the "Government having undertaken to bestow a benefit, has, in fact, inflicted a loss." *Id.* at 113 (statement of General Hines).

The Secretary points to comments made by General Hines where he notes that compensation would be authorized for those injured "as the result of accident or negligence of treatment or unskillfulness." *Id.* Although these comments make it clear that there would be compensation in the event of VA fault or negligence, the comments do not suggest that compensation would be limited to such circumstances. Indeed, such a conclusion would be flatly inconsistent with the comments of General Hines quoted above.

Based on these comments, the Secretary concedes (Pet. Br. 26) that "parts of the 1924 legislative history suggest that, Congress may have contemplated compensation for disabilities caused by medical treatment even where 'the doctor does the best he can * * * without neglect * * * and with the best medical advice' " (quoting Pet. App. 11a). The Secretary further concedes that "it is difficult to draw any confident conclusion about the in-

tended scope of Section 213 on the basis of the pre-enactment legislative history alone." Pet. Br. 26. What may be concluded with confidence is that the plain language of the statute must be given effect since there is no "clearly expressed legislative intent to the contrary." *NOW* v. *Scheidler*, 114 S. Ct. 798, 806 (1994) (quoting *GTE Sylvania*, 447 U.S. at 108).[8]

B. The Secretary urges this Court to defer to his interpretation of the statute because it allegedly was made contemporaneously with the statute's enactment. In general, where the law is "doubtful and ambiguous . . . , the contemporaneous construction" is entitled to deference. See *Edwards' Lessee* v. *Darby*, 25 U.S. (Wheat.) 206, 210-11 (1827). As discussed above, however, Section 1151 is not doubtful or ambiguous—in fact, it is very clear: the veteran will be compensated for injuries sustained as a result of VA treatment or programs. See *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (agency only entitled to deference concerning its statutory interpretation where the statutory language has "left a gap" or is ambiguous).

Further, the record does not support the Secretary's assertion that the VA contemporaneously *and consistently* interpreted the 1924 statute to require a showing of fault or accident. There were various inconsistent interpretations and applications of Section 213 within the first 10 years of its enactment, and beyond.

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[8] On August 4, 1978, the VA proposed a regulation for public notice and comment for the first time in its history. *See* 43 Fed. Reg. 34505 (1978). The proposed amendment to 38 C.F.R. § 3.358(c)(3) would have provided benefits "without regard to whether there was fault or negligence of [sic] the part of the Veterans Administration." 43 Fed. Reg. 34505 (1978). This change was being proposed after a "careful study of the legislative history of 38 U.S.C. [§] 351." *Id.* However, VA never published any regulation to this effect.

To begin with, as the Secretary concedes, VA field offices adjudicated claims on a no-fault basis for at least two years following Section 213's enactment. Pet. Br. 27. And later, in a 1929 adjudication, 59 VA General Counsel's Op. 458 (1929), benefits were awarded to a veteran under Section 213 of the 1924 Act *without* consideration of fault. In determining that a veteran was entitled to compensation for an injury resulting from hospitalization, the General Counsel stated, "[t]he prime place to go for evidence of the intention of Congress is the statute, which, in this case, is quite without ambiguity, as far as this Service can discern." *Id.* In addition, a 1929 Attorney General opinion not only made no mention of a fault requirement but interpreted the words in the statute in a manner that would be consistent with Workmen's Compensation Acts, *i.e.*, without consideration of fault. 36 Op. Att'y. Gen. 61 (1929).

The first VA regulation requiring proof of any element beside causation was not issued until two years after the enactment of Section 213. See VA Regulation No. 137 (June 11, 1926) (compensation was available for additional injury resulting from "improperly given" treatment). Moreover, the regulations promulgated in the next couple of years continued to be in flux. In 1926, satisfactory evidence of "malpractice, malfeasance, or misfeasance" had to exist for a disability to be compensable. VA Regulation No. 157 (Sept. 15, 1926). A year later the malpractice language was replaced with a less strict standard. VA Regulation No. 167 (Feb. 21, 1927) (benefits provided for all injuries except those which were "[t]he usual after results of approved medical care and treatment properly administered").

In attempting to explain the genesis of the uneven course of administrative implementation of the statute during the 1920's and 1930's, the VA General Counsel stated that "[s]ome of the difficulty seems to have resulted from the fact that administrative officials have not construed the language of the statute literally in determining whether

benefits were payable for additional disability or death due to hospitalization, medical or surgical treatment." VA General Counsel's Op. No. 2-78 (Oct. 25, 1978), J.A. 18. The non-uniform administrative interpretation of the statute in the years immediately following its enactment clearly provides no basis for modifying or ignoring the plain language of the statute. Indeed, if deference to administrative interpretation is due at all, it is due to the first field office adjudications which did not require fault on the part of the Veterans Bureau. *Id.*, J.A. 16. Those determinations were made most closely upon the passage of Section 213 when all of the circumstances surrounding its enactment were well known. See *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969); *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 549 (1940).[9]

C. The Secretary also argues that, because Congress reenacted a predecessor of Section 1151 in 1934, Congress adopted the VA's interpretation of the statute. Before the Court will apply the reenactment doctrine and adhere to the interpretation developed in the courts or an agency, it must find that there has been a consistent construction for Congress to endorse. *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1452 (1994); *Fogerty* v. *Fantasy, Inc.*, 114 S. Ct. 1023, 1032-33 (1994). As indicated above, the inconsistencies in the VA interpretations are "hardly the sort of uniform construction which Congress might have endorsed." *Id.* at 1032.

Moreover, it is well established that congressional reenactment of a statute, without more, does not prove that Congress approved an agency's implementing regulation. *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955); *Biddle* v. *Commissioner*, 302 U.S. 573, 582 (1938); *Koshland* v. *Helvering*, 298 U.S. 441, 447 (1936). This principle is particularly true when "there is nothing to indicate that [the regulation] was ever called to the attention of Congress" and reenactment "was not accompanied by any congressional discussion which throws light on [the statute's] intended scope." *United States* v. *Calamaro*, 354 U.S. 351, 359 (1957).

The Secretary points out that, in 1930-31, the House Committee on Invalid Pensions undertook a study of the then existing benefits structure. Pet. Br. 32. The Secretary notes that the Chairman of the Committee compiled a preliminary report for the Committee members. *Id.* at 32 n.18. The Secretary offers this event as proof that Congress was knowledgeable about the VA's interpretation of Section 1151 before it reenacted the statute. To begin with, this Court has " 'observed on more than one occasion that the interpretation given by one Congress (or a committee Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.' " *Central Bank*, 114 S. Ct. at 1452 (quoting *Public Employment Retirement System* v. *Betts*, 492 U.S. 158, 168 (1989)). This principle is clearly applicable here, because the legislative background material referenced by the Secretary does not remotely jus-

[9] Although the Secretary repeatedly stresses that the regulation at issue here has existed for nearly 60 years, it was not reviewable by any court until 1988. In establishing the Court of Veterans Appeals, Congress recognized that the VA has stood "in splendid isolation as the single federal administrative agency whose major functions [we]re explicitly insulated from judicial review." H.R. Rep. No. 963, 100th Cong., 2d Sess. 10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5791 (internal quotations omitted). With the passage of the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified at 38 U.S.C. § 7251 *et seq.*), there was a mechanism in place that (1) provided for judicial review of BVA decisions, (2) required the VA to comply with the Administrative Procedure Act's rulemaking procedures, and (3) required the VA to publish General Counsel Precedent Opinions in the Federal Register. These three fundamental changes opened up the VA adjudicatory process for the first time. The fact that the VA's regulations were "unscrutinized and unscrutinizable" until 1988 (Pet. App. 20a) clearly diminishes any presumption of validity or judicial deference that might otherwise be accorded long-standing administrative interpretations.

tify modifying the language of the statute or support the conclusion that Congress intended a fault-based system.

First, as conceded by the Secretary, the language of the preliminary report "could be read to assume a no-fault interpretation of Section 213." Pet. Br. 32 n.18. Second, although, as the Secretary notes, this report makes it "clear that in 1931 a key congressional committee was well aware of Section 213 and its application to veterans with non-service-connected conditions" (*id.*), the relevant inquiry is not whether Congress was aware of a section that it had enacted, but whether it knew that the VA was imposing a fault requirement on veterans. On this point, the report is, at best, ambiguous—not a surprising circumstance given the uneven course of the VA's implementation of the statute prior to 1934.

Thus, even if the VA thought fault or accident were prerequisites for compensation at the time the statute was reenacted, given the inconsistent applications of the Act prior to 1934, it is unlikely that Congress could have even ascertained with certainty what the VA practice was at the time of reenactment.[10] See *Fogerty*, 114 S. Ct. at 1032-33 (refusing to apply the reenactment principle

[10] Equally unenlightening as definitive proof of congressional intent are the comments of Senator Steiwer, who, in 1934, introduced the amendment which restored the benefits formerly provided under Section 213. Senator Steiwer noted that his proposal was meant to cover cases where "a veteran is disabled by reason of mistreatment on the part of the Government agent, as in a case of malpractice by a Government surgeon." 78 Cong. Rec. 3289 (1934). When asked if Congress was "undertaking to cover cases of malpractice upon the part of physicians," Senator Steiwer responded: "Incidentally we would." *Id.* On the same date, the Senator, in referring to his previous explanation stated, "I shall not explain it further, except to say that the language employed in this amendment, as nearly as I can remember, is a mere reenactment of the law as it existed prior to the Economy Act." *Id.* at 3298. Thus, Senator Steiwer's comments return the issue to square one: what did Congress intend when it enacted Section 213 in 1924. "That issue is our concern here, and we adhere to the statutory text in resolving it." *Central Bank*, 114 S. Ct. at 1453.

where there was no "settled construction" that "Congress might have endorsed"). Consequently, "[i]n such circumstance we consider the reenactment to be without significance." *Calamaro*, 354 U.S. at 359; see *Pierce* v. *Underwood*, 487 U.S. 552, 566-68 (1988).

D. Finally, the Secretary argues that this Court should read into the congressional silence, following the years after reenactment, acquiescence to the Secretary's fault/accident requirements. "[A]s a general matter . . . [approval through silence] arguments deserve little weight in the interpretative process." *Central Bank*, 114 S. Ct. at 1453. Although the statute has been amended several times since 1934, there is no indication that Congress was in any way addressing the question at issue here in any of those instances. Indeed, the Secretary has not offered any evidence that Congress considered the fault issue at any time since the statute's enactment in 1924. Under the circumstances, " '[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the . . . statutory interpretation.' " *Central Bank*, 114 S. Ct. at 1452 (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175, n.1 (1989)) (inner quotations omitted).[11]

[11] Because VA decisions were not judicially reviewable until 1988, they may not have been as visible as other administrative decisions, which gain public attention both when they are made and then in subsequent judicial review proceedings. The Secretary asserts that "[t]he relevant congressional committees have always paid close attention to the administration of veterans' benefits." Pet. Br. 32. This is clearly not the uniform view of members of Congress. For example, Senator Cranston, in introducing the 1988 legislation which created the Court of Veterans Appeals, noted that:

> Although, the Committee on Veterans' Affairs in both Houses carry out significant oversight of the activities of the VA, the limited resources of the Committees do not allow for thorough review of and congressional action to resolve satisfactorily all of the legal and policy issues arising in such a large and complex agency.

134 Cong. Rec. S16,643 (daily ed. Oct. 18, 1988).

"Congressional inaction cannot amend a duly enacted statute," *Central Bank*, 114 S. Ct. at 1452 (quoting *Patterson*, 491 U.S. at 175 n.1), nor can Congress add to or expand a statute by impliedly approving a regulation which conflicts with the requirements of the underlying statute. See *Leary* v. *United States*, 395 U.S. 6, 24-25 (1969) (citing *Commissioner* v. *Acker*, 361 U.S. 87, 93 (1959)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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